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PROCUREMENT

Draft articles 1 to 35 of Model Law on Procurement

Report of the Secretary-General

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INTRODUCTION

1. The Commission decided at its nineteenth session in 1986 to undertake work in the area of procurement as a matter of priority and entrusted that work to its Working Group on the New International Economic Order (A/41/17, para. 243). The Working Group commenced its work at its tenth session in October 1988. It devoted that session to deliberations on the basis of a study of procurement prepared by the Secretariat that discussed possible objectives of national procurement policies and that examined national procurement laws and practices and the roles and activities of various international institutions and development funding agencies in connection with procurement (A/CN.9/WG.V/WP.22). After completing its consideration of the study the Working Group requested the Secretariat to prepare a first draft of a Model Law on Procurement and an accompanying commentary taking into account the discussions and decisions at the session (A/CN.9/315, para. 125).

2. The first draft of articles 1 to 35 of the Model Law on Procurement and the accompanying commentary prepared by the Secretariat (A/CN.9/WG.V/WP.24 and A/CN.9/WG.V/WP.25) were considered by the Working Group at its eleventh session in February 1990. The Working Group agreed that the commentary would not be revised until after the text of the Model Law had been settled and requested the Secretariat to revise the first draft of articles 1 through 35 to take account of the discussion and decisions at its eleventh session (A/CN.9/331, para. 222). At the twelfth session, the Working Group had before it the second draft of articles 1 through 35 (A/CN.9/WG.V/WP.28) as well as draft provisions on review of acts and decisions of, and procedures followed by, the procuring entity (draft articles 36 through 42, contained in A/CN.9/WG.V/WP.27). At that session, the Working Group reviewed the second draft of articles 1 through 27. It did not have sufficient time to review draft articles 28 to 35, or the draft articles on review, and decided to consider those articles at its thirteenth session.

3. The Working Group requested the Secretariat to revise articles 1 through 27 to take into account the discussion and decisions concerning those articles at the twelfth session (A/CN.9/343, para. 229). The revision of those draft articles, as well as the second draft of articles 28 through 35 (as those articles had appeared in A/CN.9/WG.V/WP.28), is contained in the present document. In addition, the present document contains several articles that have been added to the Model Law to implement the decision of the Working Group to add two methods of procurement to those provided for in earlier drafts (those new articles being articles 33 bis to 33 sexies, and article 34 bis, in the present document). Draft provisions on review, consisting of articles 36 through 42, are contained in A/CN.9/WG.V/WP.27.

4. At the twelfth session, the Secretariat was requested to report to the thirteenth session on the treatment in national procurement laws of competitive negotiation, one of the methods of procurement other than tendering that the Working Group had agreed the Model Law should allow under certain conditions. That report on competitive negotiation is contained in A/CN.9/WG.V/WP.31.

5. As indicated in A/CN.9/WG.V/WP.28, paras. 4 to 7, in preparing the second draft of articles 28 through 35 (not including articles 33 bis to 33 sexies, and article 34 bis, in the present document), the Secretariat implemented all deletions, changes and additions agreed upon by the Working Group at its eleventh session. In addition, the Secretariat has incorporated within square brackets in those articles proposals and suggestions made at that session but in respect of which agreement was not reached. Such proposals and suggestions would not be retained in the text unless the Working Group affirmatively decides to retain or to modify them.

6. In revising articles 1 through 27 to take account of the discussion and decisions of the Working Group at the twelfth session, the Secretariat has, except where otherwise indicated, implemented all deletions, changes and additions agreed upon by the Working Group at the twelfth session. A limited number of proposals and suggestions with respect to which decisions were not taken at the twelfth session, and which the Secretariat believes the Working Group may wish to consider further, have been incorporated within square brackets. The Working Group may wish to consider that the present text of those articles will serve as a preliminary draft of the Model Law to which future revisions would be made by the Working Group itself.

7. Throughout the present document, changes of and additions to wording that appeared in earlier drafts are underlined, except in the case of headings to articles, all of which are underlined as a matter of style. Deletions from earlier drafts are indicated in the notes following each article.

Preamble 1/

[WHEREAS the Government of this State considers it desirable to regulate procurement of goods and construction so as to promote the objectives of:] 2/

(a) maximizing economy and efficiency in procurement; 3/

(b) fostering and encouraging participation in procurement proceedings by competent contractors and suppliers, including, where appropriate, participation by competent contractors and suppliers regardless of nationality, and thereby promoting international trade; 4/

(c) promoting competition among contractors and suppliers for the supply of the goods or construction to be procured;

(d) providing for the fair and equitable treatment of all contractors and suppliers;

(e) promoting the integrity of, and fairness and public confidence in, the procurement process; and

(f) achieving transparency in the procedures relating to procurement,

[Be it therefore enacted as follows.] 2/

Notes

1. Pursuant to A/CN.9/343, para. 54, the statement of objectives of the Model Law, which had been set forth in article 3 in earlier drafts, has been placed in a preamble (see also note 1 under article 3).

2. The exact structure and presentation of the preamble would depend on the legislative drafting practice of the enacting State. The introductory portion of the preamble and the enacting formula at the conclusion of the preamble presented here are merely of an illustrative character and have therefore been placed in square brackets.

3. In accordance with A/CN.9/343, para. 55, the reference to "efficiency" has been moved from the chapeau back to subparagraph (a).

4. In accordance with A/CN.9/343, para. 58, the reference to participation by contractors and suppliers whose places of business or habitual residences are located outside the enacting State has been reformulated to refer to participation by contractors and suppliers "regardless of nationality". (See also note 1 under article 11.) The objective of "promoting international trade" has been added pursuant to A/CN.9/343, para. 57.

* * *

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application *

(1) This Law applies to all procurement by procuring entities, except as otherwise provided by this article. 1/

(2) This Law does not apply to procurement involving national security or national defence, except where, and to the extent that, the procuring entity expressly declares that it applies. 2/

---

*/ Article headings are for reference purposes only and are not to be used for purposes of interpretation.

Notes

1. See A/CN.9/343, para. 11; the words "except as otherwise provided by this article" have been added at the initiative of the Secretariat.

2. Pursuant to A/CN.9/343, para. 13, the national security exclusion has been broadened to cover cases "involving" national security or national defence. The words "and to the extent that" have been added in response to the suggestion in A/CN.9/343, para. 225, that the Model Law deal with questions relating to the application of the Model Law to procurement involving national security or national defence in a separate omnibus provision, rather than in individual articles. Under the present formulation, the enacting State would be able to exclude certain individual articles when the Model Law was applied to procurement involving national security or national defence. In the discussion of article 1 at the twelfth session, it was agreed that a State should also be able to exclude the application of the Model Law to particular types of procurement in a general manner or on a case-by-case basis (see A/CN.9/343, para. 14). An optional provision along the following lines could be added to article 1 to give such a right:

> "(3) Except where, and to the extent, the procuring entity expressly declares to contractors and suppliers that this Law applies, this Law does not apply to procurement of . . . (each State enacting the Model Law may specify additional types of procurement to be excluded in a general manner), or to procurement excluded under the procurement regulations."

The Working Group may wish to consider whether permitting such an exclusion of the Model Law would be necessary in view of the various methods of procurement provided for in the Model Law that allow a procuring entity to take into account various objectives and circumstances. Furthermore, the Working Group may wish to consider whether such a provision, particularly one allowing the scope of application of the Model Law to be subject to the procurement regulations, would allow too much scope for countries to exclude various types of procurement and thereby to defeat the objectives of the Model Law.

* * *

Article 2. Definitions

For the purposes of this Law:

(new a) "procurement means the acquisition by any means, including by purchase, rental, lease or hire-purchase, of goods or of construction, including services incidental to the supply of the goods or to the construction if the value of those incidental services does not exceed that of the goods or construction themselves; 1/

(a) "procuring entity" means:

Option I

((i) any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except . . . . .;)

Option II

((i) any department, agency, organ or other unit, or any subdivision thereof, of the ("Government" or other term used to refer to the national Government of the enacting State) that engages in procurement, except . . . . . .;) 2/

(ii) (each State enacting this Model Law inserts in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity").

(b) "goods" includes raw materials, products, equipment and other physical objects of every kind and description, whether in solid, liquid or gaseous form, and electricity; 3/

(c) "construction" means all work associated with the construction, re-construction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as drilling, mapping, satellite photography, seismic investigations and similar activities incidental to such work if they are provided for in the procurement contract; 4/

(d) [deleted]; 5/

(e) [deleted]; 6/

(f) "tender security" means a security for the performance of the obligations of a contractor or supplier submitting a tender, including such arrangements as guarantees, surety bonds, letters of credit, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange; 7/

(g) "currency" includes unit of account;

(g bis) "tendering proceedings" means procedures engaged in, in accordance with articles 11 through 33, with a view towards entering into a procurement contract;

(g ter) "two-stage tendering proceedings" means procedures engaged in, in accordance with article 33 bis, with a view towards entering into a procurement contract; 8/

(g quater) "request-for-proposals proceedings" means procedures engaged in, in accordance with articles 33 ter to 33 sexies, with a view towards entering into a procurement contract; 9/

(h) "competitive negotiation proceedings" means negotiations on a competitive basis between the procuring entity and at least two contractors and suppliers, governed by article 34, with a view towards entering into a procurement contract; 10/

(h bis) "request-for-quotations proceedings" means procedures engaged in, in accordance with article 34 bis, with a view towards entering into a procurement contract; 9/

(i) "single source procurement" means procedures engaged in, in accordance with article 35, with a view towards entering into a procurement contract; 11/

(i bis) "contractor or supplier" means any party or potential party, according to the context, to a procurement contract with the procuring entity;

(j) "responsive tender" means a tender that conforms to all requirements set forth in the tender solicitation documents, subject to article 28(4). 12/

Notes

1. See A/CN.9/343, para. 19. The reference to telecommunications, transport or insurance services has been deleted in accordance with A/CN.9/343, para. 20. References to services elsewhere in the text have also been deleted.

2. Pursuant to A/CN.9/343, para. 26, option I would be adopted by non-federal States and by federal States that could legislate for their subdivisions, and option II by States that enact the Model Law only with respect to organs of the national Government. In accordance with A/CN.9/343, para. 23, the reference in subparagraph (i) to "the administration" has been dropped.

3. See A/CN.9/343, para. 30.

4. See A/CN.9/343, para. 32. Language has been added to indicate that the incidental services are those to be procured under a single procurement contract covering the construction, rather than under a separate procurement contract covering those incidental services.

5. The definition of the term "procurement proceedings" has been deleted pursuant to A/CN.9/343, para. 34. The Working Group may wish to re-examine

that decision in view of the increase in the use of the term as a result of the addition of request-for-proposal proceedings (see note 2 under article 11).

6. The definition of the term "international tendering proceedings" has been deleted pursuant to A/CN.9/343, para. 118.

7. See A/CN.9/343, paras. 40 and 41. The Working Group may wish to reconsider the necessity of mentioning both letters of credit and stand-by letters of credit as separate forms of tender securities.

8. See A/CN.9/343, para. 71.

9. See A/CN.9/343, para. 72.

10. See A/CN.9/343, para. 45.

11. The foregoing definition has been modified as a result of the addition of request-for-proposals and request-for-quotations proceedings as methods of procurement under the Model Law.

12. See A/CN.9/343, para. 52.

* * *

Article 3. [moved to preamble] 1/

Note

1. Pursuant to A/CN.9/343, para. 54, the statement of the underlying objectives of the Model Law has been moved to the preamble. The Working Group may wish to consider providing the option of setting forth the underlying objectives in an article of the Model Law, in order to accommodate those States where it is not customary to include preambles in legislation. This might be done, for example, by setting forth the objectives of the Model Law in an optional final paragraph to article 1, in which case the title of article 1 would become "Scope of application and objectives of Law".

* * *

Article 3 bis. International agreements or other international obligations of this State relating to procurement

To the extent that this Law conflicts with an obligation of this State under or arising out of any treaty or other form of agreement to which it is a party with one or more other States or under or arising out of any agreement with an intergovernmental international financing institution that is entered into by this State, the requirements of the treaty or agreement shall be applied; but in all other respects, the procurement shall be governed by this Law. 1/

Note

1. See A/CN.9/343, para. 62. The words "is entered into" replaces the words "that has already been or is subsequently entered into" in order to conform the reference to agreements with financing institutions to the reference to agreements with States.

* * *

Article 4. Procurement regulations

The . . . (each State enacting this Model Law specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to elaborate upon or supplement this Law. 1/

Note

1. In A/CN.9/343, para. 64, the Working Group agreed that article 4 should be modified to take account of the decision in A/CN.9/343, para. 14, that an enacting State should have the option of using the procurement regulations to exclude the application of the Model Law to certain types of procurement, accordingly. (See note 2 under article 1 concerning optional paragraph (3) of article 1.) Should the Working Group decide to retain such an approach, the following text could be added to article 4 by an enacting State that wished to use the procurement regulations in such a manner:

"and to provide for the exclusion of the application of this Law pursuant to article 1(3)."

* * *

Article 5. Public accessibility of procurement law, procurement regulations and other legal texts relating to procurement

This Law and the procurement regulations, all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments of this Law and those regulations and administrative rulings and directives, shall be promptly made accessible to the public.

* * *

Article 6. [deleted] 1/

Note

1. Article 6 has been deleted in accordance with the decision in A/CN.9/343, para. 66, that the Model Law instead of providing for the designation of a single organ to exercise the approval function, should provide for the designation of an organ in each article dealing with an act or decision that was subject to approval. Pursuant to A/CN.9/343, para. 67, parentheses have been placed around all references to approval in the Model Law to indicate that approval requirements need not be incorporated in legal systems in which

approval of acts and decisions of the procuring entity by another administrative authority is contrary to practice.

* * *

Article 7. Methods of procurement 1/

(1) Except as otherwise provided by this Law, a procuring entity engaging in procurement shall do so by means of tendering proceedings.

(2) [Moved to article 34] 1/

(new 2) The procuring entity may engage in procurement by means of 2/

(a) two stage tendering, subject to article 33 bis;

(b) request for proposals, subject to articles 33 ter to 33 sexies;

(c) competitive negotiation, subject to article 34;

(d) request for quotations, subject to article 34 bis;

(e) single source procurement, subject to article 35.

(3) [Moved to article 35] 1/

(new 3) When, in accordance with this Law, the circumstances of a particular procurement fit the conditions for use of more than one of the methods referred to in paragraph (new 2), the selection of the method to be used shall be made on the basis of an order of preference corresponding to the order in which the methods are set forth in paragraph (new 2). 3/

(4) [Incorporated in articles 34 and 35] 4/

(5) A procuring entity that uses a method of procurement other than tendering proceedings pursuant to paragraphs (new 2) or (new 3) shall include in the record required under article 33 bis, 33 sexies, 34(4), 34 bis(5), or article 35(1) and (2), as the case may be, a statement of the circumstances on which it relied to justify the use of that method of procurement and shall specify the relevant facts. 5/

Notes

1. The words "and conditions for their use" have been removed from the title in view of the decision in A/CN.9/343, para. 75, that the conditions under which each method may be used should be set out in the individual articles dealing with each method. Accordingly, the conditions for use of competitive negotiation, previously addressed in paragraph (2), are to be dealt with in article 34, and the conditions for use of single source procurement, previously set forth in paragraph (3), are to be set forth in article 35.

2. Pursuant to A/CN.9/343, para. 75, paragraph (new 2) lists all methods of procurement provided for in the Model Law, subject to the conditions for use and procedures set forth in the individual articles dealing with each method.

3. See A/CN.9/343, para. 79.

4. See article 34 (new 1 bis) (the text of which follows note 3 to article 34) and article 35 (new 1 bis) (the text of which follows note 1 to article 35).

5. Paragraph (5) has been modified to reflect the addition of two methods of procurement (request for proposals and request for quotations), as well as the decision to treat two-stage tendering as a separate procurement method. The exception for competitive negotiation in cases of national security has been removed in line with the inclusion of an omnibus provision, article 1(2), dealing with the application of the Model Law to procurement involving national security.

* * *

Article 8. Qualifications of contractors and suppliers

(new 1) This article applies to the ascertainment by the procuring entity of the qualifications of contractors and suppliers at any stage of the procurement proceedings. 1/

(1) Subject to the right of contractors and suppliers to protect their intellectual property or trade secrets, the procuring entity may:

(a) require contractors and suppliers participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the contractors and suppliers:

(new i) possess sufficient technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and sufficient personnel, to perform the procurement contract; 2/

(i) have legal capacity to enter into the procurement contract; 3/

(ii) are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

(iii) have fulfilled their obligations to pay taxes and social security contributions in this State;

(iv) have not been convicted of any criminal offense concerning their professional conduct or based on the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of 5 years preceding the commencement of the procurement proceedings; 4/

(v) [deleted] 5/

(vi) [moved to subparagraph (new i)]

(b) [deleted] 6/

(2) Any requirement established pursuant to paragraph (1)(a) 7/ shall be set forth in the prequalification documents, if any, and in the solicitation documents and shall apply equally to all contractors and suppliers. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of contractors and suppliers other than those provided for in paragraph (1)(a).

(2 bis) The procuring entity shall evaluate the qualifications of contractors and suppliers in accordance with the qualification criteria and procedures set forth in the prequalification documents and the solicitation documents.

(2 ter) Subject to article 11(1), the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of contractors and suppliers that discriminates against or among contractors and suppliers or against categories thereof on the basis of nationality. 8/

(3) Except where prequalification proceedings have taken place, a contractor or supplier that claims to meet the qualification criteria shall not be precluded from participating in procurement proceedings for the reason that it has not provided proof that it is qualified pursuant to paragraph (1) if the contractor or supplier undertakes to provide such proof prior to the conclusion of the procurement proceedings and if it is reasonable to expect that the contractor or supplier will be able to do so. 9/

Notes

1. See A/CN.9/331, para. 45.

2. See A/CN.9/343, para. 102.

3. The reference to the law of the State of which a contractor or supplier is a national has been deleted in accordance with A/CN.9/343, para. 95.

4. The reference to liability in civil proceedings for loss arising from the performance or failure to perform a procurement contract has been deleted in accordance with A/CN.9/343, para. 101.

5. See A/CN.9/331, para. 50.

6. Paragraph (1)(b) has been deleted because the replacement of the right of the procuring entity to inspect the books of contractors and suppliers with a right only to require contractors and suppliers to provide verification of their statements concerning their qualifications (A/CN.9/343, para. 103) appears not to provide the procuring entity with any right not already given to it under paragraph (1)(a).

7. The substance of the text that formerly appeared at this point ("and any criterion established by the procuring entity for the evaluation of the qualifications of contractors and suppliers under paragraph (1)(a)(vi)") is covered by the general reference to paragraph (1)(a) and that text has therefore been deleted. The indicated language has been aligned with paragraph (2 ter).

8. The proviso at the beginning of the paragraph has been added since discriminatory eligibility rules are permitted under article 11(1). See A/CN.9/343, para. 107, as well as paras. 118 to 120.

9. The words "subject to the efficient operation of the procurement system", that appeared at the beginning of the paragraph, have been deleted in accordance with A/CN.9/343, para. 108; concerning the indicated changes, see A/CN.9/343, paras. 109 and 110.

* * *

Article 8 bis. Prequalification proceedings 1/

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders or proposals in procurement proceedings conducted pursuant to chapters II or III, 2/ contractors and suppliers that are qualified. The provisions of article 8 shall apply to prequalification proceedings. 3/

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each contractor and supplier that requests them in accordance with the procedures specified in the invitation to prequalify 4/ and that pays the price, if any, charged for those documents.

(3) The prequalification documents shall contain [the information necessary to enable contractors and suppliers to prepare and submit applications to prequalify, including, but not limited to,] 5/

[Option I

the information required to be provided under the procurement regulations. 6/

Option II

the information required to be included in the invitation to tender pursuant to article 14(1), except subparagraphs (e) and (g) thereof, as well as 7/ the following information:

(a) instructions for preparing and submitting prequalification applications;

(b) [deleted] 8/

(c) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings; 9/

(d) any documentary evidence or other information that must be submitted by contractors and suppliers to demonstrate their qualifications;

(e) the procedures to be used for evaluating the qualifications of contractors and suppliers; 10/

(f) the manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for contractors and suppliers to prepare and submit their applications, taking into account the reasonable needs of the procuring entity; 11/

(g) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings;

(h) [deleted] 12/]

(3 bis) The procuring entity shall respond to any request by a contractor or supplier for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity, which shall not identify the source of the request, shall be given in sufficient time to enable the contractor or supplier to make a timely submission of its application to prequalify and shall be communicated to all contractors and suppliers to which the procuring entity provided the prequalification documents. 13/

[(3 ter) Any request for clarification and any response thereto by the procuring entity and any addendum to the prequalification documents shall be made in writing, including any other means that preserves a record of the request, response or addendum. However, a request for clarification or a response to such a request may be communicated by telephone provided that, immediately thereafter, confirmation of the request or response, as the case may be, and of its content, is communicated to the recipient of the request or response in writing, including by any other means that provides a record of the confirmation, and provided that, in the case of a response, the response is communicated to all contractors and suppliers to which the procuring entity provides the prequalification documents.] 14/

(4) The procuring entity shall promptly notify each contractor and supplier submitting an application to prequalify whether or not it has 15/ been prequalified [and shall make available to the general public the names of all contractors and suppliers that have been prequalified]. 16/ Only contractors and suppliers that have been prequalified are entitled to participate further in the procurement proceedings. 17/

(5) The procuring entity shall upon request communicate to contractors and suppliers that have not been prequalified the grounds therefore, but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present. 18/

[(6) A procuring entity that has engaged in prequalification proceedings is not precluded from re-evaluating at a later stage of the procurement proceedings the qualifications of contractors and suppliers that have been prequalified.]] 19/

Notes

1. Pursuant to a proposal in A/CN.9/343, para. 136, the substance of article 16 has been moved to new article 8 bis in chapter I.

2. The reference to procurement proceedings under chapter III has been added as a consequence of the inclusion of the provisions on prequalification proceedings in chapter I (in article 8 bis).

3. See A/CN.9/343, para. 139, concerning the deletion of the exclusion of prequalification proceedings in limited tendering proceedings.

4. See note 2 under article 12.

5. See A/CN.9/343, para. 147. The Working Group is invited to consider whether the retention of the text within brackets might have the unintended effect of prompting disputes as to whether the procuring entity has included in the prequalification documents the information necessary to enable contractors and suppliers to prepare and submit applications to prequalify.

6. Two options for paragraph (3) are presented in response to the request in A/CN.9/343, para. 145, that the Secretariat consider how the Model Law might permit the incorporation of detailed requirements as to the contents of the prequalification documents in the procurement regulations rather than in the text of the Law. The commentary would indicate that, under option I, the requirements enacted in the procurement regulations should mirror those set forth in option II. The Working Group may wish to consider whether providing an option to the enacting State of not establishing detailed requirements in the Law itself would be consistent with the opinion of the Working Group in A/CN.9/343, para. 144, that deleting the detailed requirements from the text of the Model Law might defeat the objectives of the Model Law and prejudice uniformity of law.

7. See A/CN.9/343, paras. 122 and 148.

8. Subparagraph (b), that referred to additional information that would be useful to the contractors or suppliers in preparing their prequalification documents, has been deleted pursuant to A/CN.9/343, para. 149.

9. The term "procurement proceedings" is used in place of the term "tendering proceedings" in order to accommodate application of the provision to procurement involving methods other than tendering.

10. The mention of criteria for evaluating the qualifications of contractors and suppliers has been deleted from subparagraph (e) since those criteria are referred to in the chapeau by way of the reference to article 14(1).

11. See note 1 under article 11; it is suggested that the commentary refer to the need to take into account the time needed by contractors and suppliers in proceedings in which contractors and suppliers participate regardless of nationality.

12. In the preparation of the second draft, subparagraph (h) was reformulated and moved to paragraph (3 bis) pursuant to A/CN.9/331, para. 76.

13. See A/CN.9/343, para. 151.

14. A provision analogous to article 22(3) concerning the form and method of communication of requests for clarification and responses thereto has been added at the initiative of the Secretariat.

15. See A/CN.9/343, para. 152.

16. At the twelfth session, differing approaches were discussed, but no decision was reached, as to the extent to which paragraph (4) should require the disclosure of the names of the contractors and suppliers that have been prequalified (see A/CN.9/343, paras. 153 to 155). In addition to the approach in the text, one approach was to say nothing about disclosure. Another approach was to require the procuring entity to specify the extent and time of disclosure in the prequalification documents. A further approach was to require the procuring entity to provide the information on request to suppliers and contractors that submitted a prequalification application and to disclose the information to the general public only after acceptance of a tender. Yet another approach was to require disclosure to contractors and suppliers but to prohibit any further disclosure.

17. The words "to participate further in the procurement proceedings" replace the words "to submit tenders" in order to accommodate procurement methods other than tendering.

18. See A/CN.9/343, para. 156.

19. The Working Group decided in A/CN.9/343, para. 161, to defer a decision on the necessity for paragraph (6) or on its formulation until the consideration of article 28(8 bis).

* * *

Article 9. [Merged with article 8] 1/

Note

1. In the preparation of the second draft, article 9 was merged with article 8 pursuant to A/CN.9/331, para. 45.

* * *

Article 10. Rules concerning documentary evidence provided by contractors and suppliers

(1) When the procuring entity requires the legalization of documentary evidence provided by contractors and suppliers to demonstrate their qualifications in procurement proceedings, the procuring entity shall not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question. 1/

(2) [deleted] 1/

(3) [deleted] 1/

Note

1. See A/CN.9/343, para. 113, concerning the reformulation of paragraph (1) and the deletion of paragraphs (2) and (3), which established certain requirements with respect to legalization of documents concerning qualifications of contractors and suppliers.

* * *

CHAPTER II. TENDERING PROCEEDINGS

SECTION I. PARTICIPATION BY CONTRACTORS AND SUPPLIERS 1/

Article 11. Participation by contractors and suppliers 1/

(1) Contractors and suppliers are permitted to participate in procurement proceedings without regard to nationality, except in cases in which, on the grounds of economy or efficiency, the procuring entity restricts participation to domestic contractors and suppliers and in cases in which, on grounds specified [in the procurement regulations or] in other provisions of law, the procuring entity decides to restrict participation in procurement proceedings on the basis of nationality. A procuring entity that restricts participation on the basis of nationality shall include in the record of the procurement proceedings a statement of the circumstances on which it relied and shall specify the relevant facts. 2/

(1 bis) In procurement proceedings in which participation is limited to domestic contractors and suppliers pursuant to paragraph (1), the procuring entity shall not be required to employ the procedures set forth in articles 8(2 ter), 12(1 bis), 14(1)(f bis), 14(1)(g), 14(2)(b bis), 14(2)(c), 17(2)(i bis), 17(2)(k), 17(2)(q), 20(4), and 26(1)(b) of this Law. 3/

(2) [deleted] 4/

Notes

1. The title that section I and article 11 bore in earlier drafts, "international tendering proceedings", has been replaced consequent to the Working Group's decision in A/CN.9/343, para. 118, that article 11 should avoid the use of the term "international tendering proceedings". In article 11 that term is replaced by the reference to tendering proceedings in which contractors and suppliers may participate "without regard to nationality". The term "international tendering proceedings" is also deleted or replaced elsewhere in the Model Law.

2. Pursuant to A/CN.9/343, para. 120, paragraph (1) establishes a presumption in favour of participation by contractors and suppliers regardless of nationality, except where such participation would not be consistent with economy and efficiency, a ground specified in the procurement regulations, or the laws of the enacting State. The reference to the use of the procurement

regulations to restrict participation is placed in square brackets in order to invite the Working Group to consider further the desirability of such a use of the procurement regulations. In order to promote transparency, a procuring entity that decides to restrict participation on the basis of nationality is required to justify its decision in the record of the procurement proceedings. The term "procurement proceedings" is used here and elsewhere in chapter II in view of the application of the provisions in question to procurement proceedings involving methods other than tendering.

3. Pursuant to A/CN.9/343, para. 120, paragraph (1 bis) specifically refers to special procedures formerly encompassed within the term "international tendering proceedings" and requires the employment of those procedures, except in the circumstances referred to in paragraph (1 bis).

4. Paragraph (2) was deleted in the preparation of the second draft pursuant to A/CN.9/331, para. 58.

* * *

SECTION II. SOLICITATION OF TENDERS AND OF APPLICATIONS TO PREQUALIFY

Article 12. Solicitation of tenders and of applications to prequalify

(1) A procuring entity shall solicit tenders, or, 1/ where applicable, applications to prequalify, from all interested contractors and suppliers by causing an invitation to tender or an invitation to prequalify, as the case may be, 2/ to be published in . . .(each State enacting this Model Law specifies the official gazette or other official publication in which the notice of proposed procurement is to be published).

(1 bis) The invitation to tender or invitation to prequalify shall also be published, in a language customarily used in international trade, at a minimum in a newspaper of wide international circulation or relevant trade publication or technical journal of wide international circulation. 3/

(2)(a) Notwithstanding the provisions of paragraph (1), the procuring entity may, when necessary for reasons of economy and efficiency, (and subject to approval by . . . (each State may designate an organ to issue the approval),) 4/ solicit tenders by sending 5/ invitations to tender only to particular contractors or suppliers selected by it. The procuring entity shall select a sufficient number of contractors and suppliers to ensure effective competition, consistent with the efficient conduct of the tendering proceedings.

(b) The invitation to tender or the invitation to prequalify may be sent 5/ to contractors and suppliers in writing, including by any other means that provides a record of its contents. However, where there is an urgent need for the goods or construction to be procured or where the estimated value of the procurement contract is less than the amount set forth in the procurement regulations, tenders or applications to prequalify may be solicited from the selected contractors and suppliers by informing them of the contents of the invitation to tender or the invitation to prequalify by telephone and sending 5/ the invitation to tender or the invitation to prequalify to them immediately thereafter in writing, including by any other

means that provides a record of the contents of the invitation to tender or the invitation to prequalify.

Notes

1. See A/CN.9/343, para. 123.

2. Pursuant to A/CN.9/343, para. 122, the separate terms "invitation to prequalify" and "invitation to tender" replace the term "notice of proposed procurement", which in earlier drafts referred to the instrument used to solicit either applications to prequalify or tenders. The Working Group may wish to consider, for the purpose of referring to the instrument used to solicit tenders, to revert to the use of the term "notice of proposed procurement" or to use a similar term, such as "invitation to participate in procurement proceedings" or "invitation to offer", that does not contain a reference to a particular method of procurement. Such an approach could be taken in view of the incorporation by reference of portions of articles 12 and 14 into the provisions dealing with procurement through requests for proposals (see article 33 ter(3) and (4)). See also note 4 under article 33 ter.

3. The substance of paragraph (1 bis), which earlier appeared in paragraph (1), has been moved to paragraph (1 bis) in line with the Working Group's decision with respect to article 11 (see notes 1 and 3 under that article). See also A/CN.9/343, paras. 125 and 126.

4. See A/CN.9/343, para. 130.

5. See A/CN.9/343, paras. 128 and 131.

* * *

Article 13. [Deleted] 1/

Note

1. Deleted in the preparation of the second draft pursuant to A/CN.9/331, para. 62.

* * *

Article 14. Contents of invitation to tender and invitation to prequalify 1/

(1) The invitation to tender shall contain at least the following information:

(a) the name and address of the procuring entity;

(b) the nature and quantity of the goods to be supplied or the nature and location of the construction to be effected;

(c) the desired or required time for the supply of the goods or for the completion of the construction;

(d) the criteria to be used for evaluating the qualifications of contractors and suppliers, in conformity with article 8(1)(a);

(d bis) a declaration, which may not later be altered, that contractors and suppliers may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality, as the case may be; 2/

(e) the means of obtaining the solicitation documents and the place from which they may be obtained; 3/

(f) the price, if any, charged by the procuring entity for the solicitation documents; 4/

(f bis) the currency and means of payment for the solicitation documents; 4/

(g) the language or languages in which the solicitation documents are available; 5/

(h) the place and deadline for the submission of tenders;

(i) [deleted] 6/

(j) [deleted] 7/

(2) An invitation to prequalify 8/ need not contain the information referred to in paragraph (1)(e), (g) or (h), but shall contain the information referred to in paragraph (1)(a), (b), (c), (d), (d bis) and (f), 9/ as well as the following information:

(a) the means of obtaining the prequalification documents and the place from which they may be obtained;

(b) the price, if any, charged by the procuring entity for the prequalification documents; 10/

(b bis) the currency and terms of payment for the prequalification documents; 10/

(c) the language or languages in which the prequalification documents are available; and 5/

(d) the place and deadline for the submission of applications to prequalify.

Notes

1. See note 2 under article 12.

2. See A/CN.9/343, paras. 121 and 134. Under the present formulation, the procuring entity would be permitted to alter a declaration that restricted the procurement proceedings to domestic contractors and suppliers.

3. In view of the incorporation by reference of provisions dealing with solicitation documents in tendering proceedings into article 33 ter(4)(a)(ii) (request for proposals), the term "solicitation documents" is used rather than the term "tender solicitation documents".

4. The reference to currency and means of payment for solicitation documents, formerly contained in subparagraph (f), is set apart in subparagraph (f bis) in accordance with the modification of article 11 (see notes 1 and 3 under that article).

5. See note 1 under article 11.

6. Subparagraph (i), which referred to the tender security, has been deleted pursuant to A/CN.9/343, para. 133.

7. Subparagraph (j), which referred to the right of recourse under the Model Law, has been deleted pursuant to A/CN.9/343, para. 133.

8. See note 2 under article 12.

9. See A/CN.9/343, para. 135. The new provision in subparagraph (d bis) has been added to the information required to be included in the invitation to prequalify and the requirement of information about the place and deadline for submitting tenders has been excluded.

10. The reference to the currency and terms of payment for the prequalification documents, formerly contained in subparagraph (b), is set apart in subparagraph (b bis) in accordance with the modification of article 11 (see notes 1 and 3 under that article).

* * *

Article 15. [merged with article 8] 1/

Note

1. See A/CN.9/331, para. 66, and note 1 to article 15 in A/CN.9/WG.V/WP.28.

* * *

SECTION III. PREQUALIFICATION OF CONTRACTORS AND SUPPLIERS 1/

Article 16. [moved to article 8 bis] 1/

Notes

1. This section will be deleted if the Working Group affirms the transfer of the substance of article 16 to article 8 bis (see note 1 under article 8 bis).

* * *

SECTION IV. SOLICITATION DOCUMENTS 1/

Note

1. See note 3 under article 14.

* * *

Article 17. Solicitation documents 1/

(1) The procuring entity shall provide the solicitation documents to contractors and suppliers in accordance with the procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each contractor and supplier that has been prequalified and that pays the price, if any, charged for those documents.

(2) The solicitation documents shall contain [the 2/ information necessary to enable contractors and suppliers to prepare and submit responsive tenders, and information concerning the procedures for the opening, examination, comparison and evaluation of tenders, including, but not limited to,] 3/ the following information:

(a) instructions for preparing tenders;

(b) the criteria and procedures, in conformity with the provisions of article 8, relative to the evaluation of the qualifications of contractors and suppliers and relative to the re-confirmation of qualifications pursuant to article 28(8 bis); 4/

(c) [merged with subparagraph (b) in the preparation of the second draft]

(d) any documentary evidence or other information that must be submitted by contractors and suppliers to demonstrate their qualifications; 5/

(e) the nature and required technical and quality characteristics, in conformity with article 20, 6/ of the goods or construction to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; the location where the construction is to be effected; and the desired or required time, if any, when the goods are to be delivered or the construction is to be effected;

(f) the terms and conditions of the procurement contract and the contract form, if any, to be signed by the parties; 7/

(g) if alternatives to the characteristics of the goods, construction, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, 8/ a statement to that effect;

(h) if contractors and suppliers are permitted to submit tenders for only a portion of the goods or construction to be procured, a description 9/ of the portion or portions for which tenders may be submitted;

(i) the manner in which the tender price is to be formulated and expressed; 10/;

(i bis) the currency or currencies in which the tender price is to be formulated and expressed; 10/

(j) [deleted] 11/

(k) the language or languages, in conformity with article 23, in which tenders are to be prepared; 12/

(l) any requirements of the procuring entity with respect to the nature, amount and other principal terms and conditions of any tender security to be provided by contractors and suppliers submitting tenders and of any security for the performance of the procurement contract to be provided by the contractor or supplier that enters into the procurement contract, including securities such as labour and materials bonds, and with respect to the type of institutions or entities from which such securities will be acceptable; 13/

(m) the manner, place and deadline for the submission of tenders, in conformity with article 24; 6/

(n) the means by which, pursuant to article 22, contractors and suppliers may seek clarifications of the solicitation documents and a statement as to whether the procuring entity intends to convene a meeting of contractors and suppliers; 14/

(n bis) [deleted] 15/

(o) the period of time during which tenders shall be in effect, in conformity with article 25; 6/

(p) the place, date and time for the opening of tenders, in conformity with article 27; 6/ the procedures to be followed for opening and examining tenders and the procedures and criteria for evaluating and comparing tenders and for ascertaining the most economic tender as defined in article 28(7)(c); 16/

(q) the currency that will be used for the purpose of evaluating and comparing tenders pursuant to article 28(8) 6/ and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used; 17/

(r) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to the procurement proceedings;

(s) references to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 36 or give rise to liability on the part of the procuring entity; 18/

(t) the name(s), functional title(s) and address(es) of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from contractors and suppliers in connection with the procurement proceedings, without the intervention of an intermediary; 19/

(u) any commitments to be made by the contractor or supplier outside of the procurement contract, such as commitments relating to countertrade and to the transfer of technology; 20/

(v) [deleted] 21/

[(w) the right under article 36 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;] 22/

(x) if the procuring entity reserves the right to reject all tenders pursuant to article 29, a statement to that effect;

(y) any formalities that will be required in order for a tender that has been accepted to enter into force, including, where applicable, the signature of a written procurement contract pursuant to article 32.

Notes

1. The substance of article 18, which sets forth the required contents of the solicitation documents, has been merged with article 17 in order to provide, in the same article that imposes on the procuring entity the obligation to provide solicitation documents, an indication of the meaning of the term "solicitation documents". The title has been modified accordingly.

2. See A/CN.9/343, para. 164.

3. Brackets have been placed around a portion of paragraph (2) in order to invite the Working Group to consider whether retention of that text might have the unintended effect of giving rise to claims that the procuring entity failed to provide certain information not referred to in subparagraphs (a) through (y) that was nevertheless "necessary". The information in subparagraphs (a) through (y) might be regarded as a sufficient itemization of the information that should be provided to contractors and suppliers.

4. See A/CN.9/343, paras. 163 and 166.

5. See A/CN.9/343, para. 167.

6. See A/CN.9/343, para. 168. The Working Group may wish to consider further the necessity of retaining the cross-references here and elsewhere in article 17.

7. See A/CN.9/343, paras. 171 and 173.

8. See A/CN.9/343, para. 174.

9. See A/CN.9/343, para. 175.

10. The mention of the currency in which the tender price is to be formulated is set apart in subparagraph (i bis) in accordance with the modification of article 11 (see notes 1 and 3 under that article).

11. See A/CN.9/331, para. 89.

12. See A/CN.9/343, para. 163. See also note 6.

13. See A/CN.9/343, para. 177; the reference to any choice offered by the procuring entity with respect to the tender security has been deleted pursuant to A/CN.9/343, para. 177.

14. See A/CN.9/343, para. 178.

15. Paragraph (n bis), that referred to a reservation by the procuring entity of the right to modify the solicitation documents, has been deleted pursuant to A/CN.9/343, para. 198.

16. The illustrative list of procedures and criteria for evaluating and comparing tenders has been deleted pursuant to A/CN.9/343, para. 180.

17. Concerning the deletion of the reference to "international tendering proceedings", see note 1 to article 11. The word "published" replaces the word "issued".

18. Pursuant to A/CN.9/343, para. 183, subparagraph (s)(ii) has been deleted and the substance of subparagraph (s)(i) has been retained in modified form.

19. The reference to "functional title(s)" has been added in order to take account of possible personnel changes in the procuring entity.

20. See A/CN.9/343, para. 184.

21. Subparagraph (v), which referred to approval required for acts and decisions of the procuring entity, has been deleted pursuant to A/CN.9/343, para. 185.

22. The Working Group decided in A/CN.9/343, para. 186, to defer a decision as to the retention of the subparagraph until after it has considered the section on review.

* * *

Article 18. [merged with article 17]

* * *

Article 19. Charge for solicitation documents

The procuring entity may charge contractors and suppliers a sum for solicitation documents provided to them. The sum shall reflect only the cost of printing the solicitation documents and providing them to contractors and suppliers.

* * *

Article 20. Rules concerning description of goods or construction in prequalification documents and solicitation documents; language of prequalification documents and solicitation documents

(1) Specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods or construction to be procured, and requirements concerning testing and test methods, packaging, marking or

labelling or conformity certification, and symbols and terminology, shall not be included or used in the prequalification documents or in the solicitation documents with a view to creating 1/ obstacles to participation by contractors or suppliers in the procurement proceedings, 2/ nor shall such specifications, plans, drawings, designs, requirements, symbols or terminology be included or used that have the effect of creating 1/ obstacles to such participation.

(2) To the extent possible, specifications, plans, drawings, designs and requirements shall be based on the relevant objective technical and quality characteristics of the goods or construction to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods or construction to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods or construction to be procured shall be used, where available, in formulating the specifications, plans, drawings and designs to be included in the prequalification documents and in the solicitation documents.

(b) Standardized trade terms shall be used, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents and of the solicitation documents.

(c) [deleted] 3/

(4) The prequalification documents and the solicitation documents shall be formulated in . . . (each State enacting this Model Law specifies its official language or languages) (and in a language customarily used in international trade). 4/

Notes

1. See A/CN.9/343, para. 191.

2. The reference to international procurement proceedings and to foreign contractors and suppliers has been deleted in accordance with the modification of article 11. It may be considered that no specific prohibition against obstacles to foreign contractors and suppliers is necessary in view of the presumption in the Model Law that participation is permitted regardless of nationality, except in limited circumstances. Were such a specific provision considered desirable, it might be added as follows, with an appropriate reference included in article 11(2):

> "(1 bis) Specifications, plans, drawings, designs, requirements, symbols or terminology shall not be included or used with a view to, or having the effect of, creating obstacles to participation of contractors and suppliers regardless of nationality."

3. Deleted in the second draft pursuant to A/CN.9/331, para. 108.

4. See note 1 to article 11. The rule on the prevailing language in the event of a conflict between language versions has been deleted pursuant to A/CN.9/343, para. 194.

* * *

Article 21. [deleted] 1/

Note

1. Deleted in the second draft pursuant to A/CN.9/331, para. 114.

* * *

Article 22. Clarifications and modifications of solicitation documents

(1) A contractor or supplier may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a contractor or supplier for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of tenders. The response by the procuring entity, which shall not identify the source of the request, shall be given in sufficient time to enable the contractor or supplier to make a timely submission of its tender and shall be communicated to all contractors and suppliers to which the procuring entity provides the solicitation documents. 1/

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether at its own initiative or in response to a clarification requested by a contractor or supplier, modify the solicitation documents by issuing an addendum to them. 2/ The addendum shall be communicated promptly to all contractors and suppliers to which the procuring entity sends the solicitation documents and shall be binding on those contractors and suppliers.

(3) Any request for clarification and any response thereto by the procuring entity and any addendum to the solicitation documents shall be made in writing, including by any other means that preserves a record of the request, response or addendum. However, a request for clarification or a response to such a request may be communicated by telephone provided that, immediately thereafter, confirmation of the request or response, as the case may be, is communicated to the recipient of the request or response in writing, including by any other means that provides a record of the confirmation and provided that, in the case of a response, the response is communicated to all contractors and suppliers to which the procuring entity provided the solicitation documents. 3/

(4) If the procuring entity convenes a meeting of contractors and suppliers, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be prepared in writing, including by any other means that

provides a record of the information contained therein and shall be provided to all contractors and suppliers to which the procuring entity provided the solicitation documents.

Notes

1. See A/CN.9/343, para. 195.

2. The stipulation that a procuring entity may modify the solicitation documents only if it has reserved the right to do so in those documents has been deleted pursuant to A/CN.9/343, para. 198. See also note 15 under article 18.

3. See A/CN.9/343, para. 200.

* * *

SECTION V. TENDERS

Article 23. Language of tenders

Tenders may be formulated and submitted in any language in which the solicitation documents have been issued or in any other language which the procuring entity specifies in the tender solicitation documents. 1/

Note

1. See A/CN.9/343, para. 202.

* * *

Article 24. Submission of tenders

(1) The procuring entity shall fix a specific date and time as the deadline for the submission of tenders. The deadline shall allow sufficient time for all interested contractors and suppliers to prepare and submit their tenders and shall take into account the reasonable needs of the procuring entity. 1/

(2) If the procuring entity issues a clarification or modification of the solicitation documents pursuant to article 22, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford contractors and suppliers reasonable time to take the clarification or modification into account in their tenders.

(2 bis) The procuring entity may, prior to the deadline for the submission of tenders, extend the deadline if, due to circumstances beyond the control of contractors or suppliers, it is not possible for contractors or suppliers to submit their tenders by the deadline. 2/

(2 ter) Notice of any extension of the deadline shall be given promptly in writing, including by any other means that provides a record of the information contained therein, to each contractor and supplier to which the

procuring entity provided the solicitation documents. However, notice of an extension of the deadline may be communicated by telephone provided that such telephone notice is given to all such contractors and suppliers and 3/ provided that, immediately thereafter, confirmation of the notice is communicated to the contractors and suppliers in writing, including by any other means that provides a record of the confirmation.

(3) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened 4/ and shall be returned to the contractor or supplier that submitted it.

(4) Tenders shall be submitted in writing and in sealed envelopes. The procuring entity shall [on request] provide to the contractor or supplier a receipt showing the date and time when the tender was received. 5/

Notes

1. Pursuant to A/CN.9/343, para. 203, the words "all interested" have been added and the reference to international tendering proceedings and foreign contractors and suppliers has been deleted.

2. See A/CN.9/343, para. 205.

3. See A/CN.9/343, para. 206.

4. The words "or considered" have been deleted pursuant to A/CN.9/343, para. 207.

5. Pursuant to A/CN.9/343, para. 207, the second sentence, which permitted submission of tenders by means other than in writing and in sealed envelopes, has been deleted; the words "on request" have been added at the initiative of the Secretariat.

* * *

Article 25. Period of effectiveness of tenders; modification and withdrawal of tenders

(1) Tenders shall be in effect during the period of time specified in the solicitation documents. The period of time shall commence at the deadline for submission of tenders.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may 1/ request contractors or suppliers to extend the period for an additional specified period of time. A contractor or supplier may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness. The request and the responses thereto shall be made in writing, including any other means that provides a record of the information contained therein. However, a request or a response may be communicated by telephone provided that, immediately thereafter, confirmation of the request or response is communicated to the recipient in writing, including by any other means that provides a record of the confirmation. 2/

(b) Contractors and suppliers that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or, if it is not possible to do so, provide new tender securities, to cover the extended period of effectiveness of their tenders. A contractor or supplier whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender. 3/

(3) A contractor or supplier may modify or withdraw its tender prior to the deadline for the submission of tenders, but not thereafter. 4/ Such modification or withdrawal shall be communicated to the procuring entity in writing, including by any other means that provides a record of the information contained therein. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for submission of tenders.

Notes

1. The words "in exceptional circumstances" have been deleted in accordance with A/CN.9/343, para. 209.

2. The alignment of the final sentence with changes agreed to for article 22(3), referred to in A/CN.9/343, para 209, appears not to be necessary in view of the differing circumstances addressed in this subparagraph and in article 22(3), which deals with responses to requests for clarification of the solicitation documents. Unlike clarifications by the procuring entity of the solicitation documents, responses by contractors and suppliers to requests to extend the period of effectiveness of a tender do not have to be communicated to other contractors and suppliers.

3. See A/CN.9/343, para. 210.

4. See A/CN.9/343, para. 213.

* * *

SECTION VI. TENDER SECURITIES

Article 26. Tender securities

(1) When the procuring entity requires contractors and suppliers submitting tenders to provide a tender security:

(a) the requirement shall apply to all such contractors and suppliers;

(a bis) the solicitation documents may stipulate that the institution or entity issuing the tender security and the institution or entity, if any, confirming the tender security must be acceptable to the procuring entity; 1/

(b) notwithstanding the provisions of subparagraph (1)(a bis), a tender security shall not be rejected by the procuring entity on the grounds that the tender security was not issued by an institution or entity in

this State if the tender security and the institution or entity otherwise conform to lawful requirements set forth in the solicitation documents, unless the acceptance by the procuring entity of such a tender security would be in violation of a law of this State; 2/

(c) [moved to subparagraph (a bis)]

(d) the procuring entity may, without being precluded from stipulating in the solicitation documents other circumstances under which it is entitled to claim the amount of the tender security, require, in the solicitation documents, that the tender security include provisions entitling the procuring entity to claim the amount of the security if the contractor or supplier that supplied it: 3/

(i) withdraws or modifies its tender after the deadline for submission of tenders; or 4/

(ii) [deleted] 5/

(iii) fails to sign a procurement contract if required by the procuring entity to do so or fails to provide a required security for the performance of the contract after its tender has been accepted.

(2) The procuring entity shall make no claim to the amount of the tender security, and shall, without delay, return or procure the return of the tender security document to the contractor or supplier that supplied it, after the earliest to occur of:

(a) the expiry of the tender security,

(b) the entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required,

(c) the termination of the tendering proceedings without the entry into force of a procurement contract, or

(d) the withdrawal of the tender in connection with which the tender security was supplied prior to the deadline for the submission of tenders. 6/

Notes

1. In A/CN.9/343, para. 217, the Secretariat was requested to consider combining subparagraphs (b) and (c). It appears that keeping these provisions separate would make clear that the procuring entity may in all cases impose the condition that the issuer of the tender security must be acceptable to the procuring entity and that the procuring entity may reject a tender security issued by an institution considered not creditworthy (i.e., even in cases of wholly domestic procurement in which subparagraph (b) would not apply pursuant to article 11). Because it appeared preferable that that principle be stated before stating the rule in paragraph (b), the substance of subparagraph (c) has been moved to subparagraph (a bis). The reference to a confirming institution or entity has been added pursuant to A/CN.9/343, para. 218.

2. See A/CN.9/343, paras. 215 to 217.

3. See A/CN.9/343, para. 220. The Working Group may wish to consider whether the chapeau, as presently formulated, provides unecessarily broad latitude to the procuring entity with respect to setting the required terms and conditions of the tender security.

4. See A/CN.9/343, para. 221.

5. Subparagraph (d)(ii), which referred to the forfeiture of the tender security for a refusal to accept a correction of an arithmetical error, has been deleted pursuant to A/CN.9/343, para. 221.

6. See A/CN.9/343, para. 223.

* * *

SECTION VII. OPENING, EXAMINATION, EVALUATION AND COMPARISON OF TENDERS

Article 27. Opening of tenders

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline specified in any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.

(2) All contractors and suppliers that have submitted tenders or their representatives shall be permitted by the procuring entity to be present at the opening of tenders. 1/

(3) The name and address of each contractor or supplier whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request 2/ to contractors and suppliers that have submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article 33(1). 2/

Notes

1. See A/CN.9/343, para. 227. The Working Group agreed in A/CN.9/343, para. 225, that the right of contractors and suppliers to be present at the opening of tenders should not apply in cases of national security or national defence in which the Model Law was exceptionally applied. Under article 1(2), the procuring entity may exclude article 27(2) when applying the Model Law to procurement involving national security and national defence.

2. See A/CN.9/343, para. 228.

* * *

Article 28. Examination, evaluation and comparison of tenders *

(1) (a) To assist in the examination, evaluation and comparison of tenders, the procuring entity may ask contractors and suppliers for clarifications of their tenders. Any request for clarification and any response to such a request shall be in writing or in any other form that provides a record of the information contained therein. [However, a request or response may be communicated by telephone provided that, immediately thereafter, confirmation of the request or response is communicated to the recipient in writing or by any other means that provides a record of the request or response.] 1/ No change in the tender price or other matter of substance in the tender shall be sought, offered or permitted, except as provided in subparagraph (b).

[(b) The procuring entity shall correct purely arithmetical errors apparent on the face of a tender.] 2/

(2) The procuring entity shall reject a tender:

(a) if the contractor or supplier that submitted the tender is not qualified, subject to article 8(3); 3/

(b) if the contractor or supplier submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1)(b);

(c) if the tender is not responsive; 4/

[(d) if the tender is received by the procuring entity after the deadline for the submission of tenders]. 5/

(3) [Subject to approval,] the procuring entity may reject a tender if the contractor or supplier that submitted it offers, gives or agrees to give to any officer or employee or former officer or employee of the procuring entity a gratuity, whether or not in the form of money, an offer of employment or any other thing or service of value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the tendering proceedings. The rejection of the tender and the reasons therefor shall be recorded in the record of the tendering proceedings. 6/

(4) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents. Those permitted deviations shall be quantified and appropriately taken account of in the evaluation and comparison of tenders. 7/

(5) [deleted] 8/

(6) [deleted] 9/

(7) (a) The procuring entity shall evaluate and compare tenders that have not been rejected pursuant to paragraph (2) or (3) in order to ascertain the most economic tender, as defined in subparagraph (c), 10/ in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents. 11/

(b) [deleted] 12/

(c) The most economic tender shall be either:

(i) the tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (e) of this paragraph, or

(ii) the lowest evaluated tender, 13/ which shall be ascertained on the basis of objective and quantifiable criteria, to the extent possible, including, in addition to the tender price, subject to any margin of preference applied pursuant to subparagraph (e) of this paragraph, such criteria as: the costs of operating, maintaining and repairing the goods or construction over its expected useful life; the functional characteristics of the goods, construction [or services] ; the efficiency and productivity of the goods, construction [or services]; the time for delivery of the goods, completion of the construction [or rendering of the services]; the terms of payment; and the terms and conditions of the quality guarantee in respect of the goods, construction [or services]. 14/

[(d) In addition to criteria of the nature referred to in subparagraph (c)(ii) of this paragraph, the procuring entity may apply criteria concerning the effect of the tender on the balance of payments or the foreign exchange reserves of (this State); the extent to which enterprises, personnel, industries, regions or economic sectors in (this State) would benefit economically as a result of the tender; or the extent to which technological, production, operational, managerial or similar information or skills would be acquired by enterprises or personnel in (this State). To the extent possible, such criteria shall be expressed in the solicitation documents in objective and quantifiable terms.] 15/

(e) In evaluating and comparing tenders, a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors and suppliers or for the benefit of tenders for domestically produced goods. The margin of preference shall be applied by deducting from the tender prices of all tenders, other than those that are to benefit from the margin of preference, import duties and taxes and sales and similar taxes levied in connection with the supply of the goods [or services] or with the construction, and adding to the resulting tender prices the amount of the margin of preference provided for in the procurement regulations or the actual import duty, whichever is less. 16/

(8) When tender prices are expressed in two or more currencies, the tender prices [of all tenders] shall be converted to [the same] currency for the purpose of evaluating and comparing tenders. 17/

(8 bis) Where the procuring entity has engaged in prequalification proceedings pursuant to article 16 it shall, and when it has not engaged in prequalification proceedings it may, require the contractor or supplier submitting the tender that has been found to be the most economic tender pursuant to article 28(7)(c) to reconfirm its qualifications in accordance with criteria and procedures conforming to the provisions of article 8. The criteria and procedures to be used for such reconfirmation shall be set forth

in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings. 18/

(9) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to contractors or suppliers or to any other person not officially involved in the examination, evaluation or comparison of tenders or involved 19/ in the decision of which tender should be accepted, except as provided in article 33(2).

(10) [deleted] 20/

Notes

* The second draft of article 28, which was not reviewed by the Working Group at the twelfth session, is presented here, with the accompanying notes, as it appeared in A/CN.9/WG.V/WP.28. The reference to approval in paragraph (3) should be modified in accordance with A/CN.9/343, paras. 66 and 67, and the references to services in paragraph (7)(c) should be deleted in accordance with A/CN.9/343, para. 20 (see note 1 under article 2).

1. See A/CN.9/331, para. 117.

2. See A/CN.9/331, para. 145. This subparagraph has been placed within square brackets in view of the discussion in A/CN.9/331, para. 146. The subparagraph will be retained in its present form unless the Working Group decides otherwise. The sentence in the first draft which read: "Any such correction shall be binding on the contractor or supplier that submitted the tender if accepted by that contractor or supplier" has been deleted on the initiative of the Secretariat as the point seemed to be covered by paragraph (2)(b).

3. Pursuant to the proposal in A/CN.9/331, para. 45, the reference to eligibility that appeared in the first draft has been deleted. The reference to article 8(3) corrects a typographical error. The square brackets surrounding that reference in the first draft have been removed in view of the decision to retain article 8(3) (see note 14 to article 8).

4. The reference to paragraph (6) that appeared in the first draft has been deleted in view of the deletion of paragraph (6). The reference to article 29(1)(a) that appeared in the first draft was a typographical error and the reference should have been article 30(1)(a). The reference has been deleted in view of the deletion of article 30(1)(a).

5. This subparagraph has been added pursuant to A/CN.9/331, para. 150. The Working Group may wish to consider whether it is preferable to require the procuring entity to return a late tender unopened, as currently provided in article 24(3), rather than to retain the tender and reject it under article 28(2). If so, the present subparagraph should be deleted.

6. See A/CN.9/331, para. 152. With respect to the requirement of approval, see note 1 to article 6.

7. Pursuant to A/CN.9/331, para. 156, the first sentence of this subparagraph has been relocated to article 2(j), the remainder of the subparagraph has been

slightly reworded, and subparagraph (b) has been deleted.

8. See A/CN.9/331, para. 159.

9. See A/CN.9/331, para. 164.

10. Pursuant to A/CN.9/331, paras. 92 and 166, the term "most economic tender" replaces the term "most advantageous tender" that appeared in the first draft, and the reference to subparagraph (c) has been added.

11. See A/CN.9/331, para. 169.

12. See A/CN.9/331, para. 167.

13. The term "lowest evaluated tender" replaces the term "most economically advantageous tender" that appeared in the first draft, as a consequence of the change of the term "most advantageous tender" to "most economic tender".

14. The last clause of this subparagraph as it appeared in the first draft has been deleted pursuant to A/CN.9/331, para. 168. With respect to the references to services in this subparagraph and elsewhere in the article, see note 8 to article 2.

15. See A/CN.9/331, para. 172.

16. See A/CN.9/331, para. 173. The approach reflected in the indicated wording conforms with that followed by several international financing institutions. The Working Group may wish to consider whether the matters addressed by the wording would be better dealt with in the procurement regulations.

17. See A/CN.9/331, para. 174.

18. See A/CN.9/331, paras. 70, 73 and 78. With reference to the statement in A/CN.9/331, para. 78, that the provision should indicate what was to occur if the qualifications of the contractor or supplier were not reconfirmed, it seems clear that the tender would have to be rejected under article 28(2)(a), and that the provisions of article 7(2)(b) would apply. The Working Group may wish to consider whether it is necessary for that information to be added to the provision. [The reference to article 16 should be read as a reference to article 8 bis (see note 1 under article 8 bis.]

19. Added on the initiative of the Secretariat to achieve greater clarity.

20. See A/CN.9/331, para. 176.

* * *

Article 29. Rejection of all tenders *

(1) [Subject to approval,] [and if so specified in the solicitation documents,] the procuring entity may, at any time prior to the acceptance of a tender, reject all tenders for any reason other than for the sole purpose of engaging in competitive negotiation proceedings and other than any fraudulent purpose. 1/

(1 bis) If the procuring entity rejects all tenders for the reason that the tender prices of all tenders substantially exceed an estimated price established by the procuring entity prior to the commencement of the tendering proceedings, it may either engage in new tendering proceedings on the basis of modified specifications concerning the technical or quality characteristics of the goods, construction [or services] to be procured, or [, subject to approval,] engage in competitive negotiation proceedings with the qualified contractor or supplier that submitted the most economic tender as defined in article 28(7)(c). 2/

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1), towards contractors and suppliers that have submitted tenders. The procuring entity shall upon request communicate to any contractor or supplier that submitted a tender the grounds for its rejection of all tenders, but shall not be required to justify those grounds. 3/

(3) Notice of the rejection of all tenders pursuant to this article shall be given promptly, in writing or by any other means that provides a record of the information contained therein, to all contractors and suppliers that submitted tenders. [However, the notice may be communicated by telephone provided that, immediately thereafter, confirmation of the notice is communicated in writing or by any other means that provides a record of the confirmation.] 4/

Notes

* The second draft of article 29, which was not reviewed by the Working Group at the twelfth session, is presented here, with the accompanying notes, as it appeared in A/CN.9/WG.V/WP.28. The references to approval in paragraphs (1) and 1(bis) should be modified in accordance with A/CN.9/343, paras. 66 and 67, and the reference to services in paragraph (1 bis) should be deleted in accordance with A/CN.9/343, para. 20 (see note 1 under article 2).

1. See A/CN.9/331, paras. 177, 180, and 182. With respect to the requirement of approval in this paragraph and elsewhere in the article, see note 1 to article 6. The intent of the word "sole" is to recognize that, pursuant to paragraph (1 bis) (added pursuant to A/CN.9/331, para. 182), the procuring entity may reject all tenders for the reason that they all exceed an estimated price, and that in such a case it may engage in competitive negotiation proceedings. The Working Group may wish to consider whether it is useful or desirable to require the right to reject all tenders to be reserved in the solicitation documents. Minor changes in drafting have been made on the initiative of the Secretariat in order to improve the clarity of the paragraph.

2. See A/CN.9/331, para. 182. The Working Group may wish to note that the case where all tenders are rejected because they exceed an estimated price is the only case that is subject to the special provisions set forth in this paragraph. In all other cases where all tenders are rejected, the manner in which the procuring entity may proceed is governed by article 7; namely, it may commence new tendering proceedings (without necessarily having to modify the specifications) or, in the cases mentioned in article 7(2), it may engage in competitive negotiation proceedings. The Working Group may wish to consider whether the situation envisaged by this paragraph should also be left to be governed by the provisions of article 7. In addition, in connection with the issue of estimated prices, the Working Group may wish to recall its

disapproval of maximum prices, minimum prices and a range of prices (A/CN.9/331, paras. 89 and 182), and consider whether reference in the Model Law to estimated prices is desirable.

3. See A/CN.9/331, para. 181.

4. See A/CN.9/331, para. 117.

* * *

Article 30. Negotiations with contractors and suppliers *

No negotiations shall take place between the procuring entity and a contractor or supplier with respect to a tender submitted by the contractor or supplier, except as provided in article 29(1 bis) and article 31(4). 1/

Note

* The second draft of article 30, which was not reviewed by the Working Group at the twelfth session, is presented here, with the accompanying note, as it appeared in A/CN.9/WG.V/WP.28.

1. Paragraphs (1)(a) and (b) and paragraph (2) have been deleted pursuant to A/CN.9/331, paras. 182 and 183. The prevailing view of the Working Group, expressed in A/CN.9/331, para. 184, was that the chapeau of paragraph (1) should be retained but placed elsewhere in the Model Law. The chapeau has been retained in article 30 in the present draft as no other location was found to be appropriate. The final words have been added in view of the addition of paragraph (1 bis) in article 29 and of the reference in article 31(4) to negotiations.

* * *

SECTION VIII. TWO-STAGE TENDERING PROCEEDINGS 1/

Note

1. See A/CN.9/331, para. 186. [See also the note to the title of article 31.]

* * *

Article 31. Two-stage tendering proceedings *

(1) [Subject to approval,] 1/ the procuring entity may employ the procedures provided for in this article where:

(a) instead of formulating detailed specifications for the goods, construction [or services], the procuring entity seeks proposals from contractors and suppliers in order to obtain the most advanced or the most appropriate technology or otherwise to obtain the most satisfactory solution to its procurement needs; 2/ or

(b) due to the nature of the goods, construction [or services], the procuring entity is unable to formulate detailed technical specifications. 2/

(2) The provisions of chapter II of this Law shall apply to tendering proceedings in which the procedures provided for in the present article are employed except to the extent those provisions are derogated from in the present article.

(3) The solicitation documents, which shall be prepared in conformity with articles 18 and 20 of this Law, shall call upon contractors and suppliers to submit initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the goods, construction [or services] as well as to contractual terms and conditions of their supply. 3/

(4) The procuring entity may engage in negotiations 4/ with any contractor or supplier whose tender has not been rejected pursuant to article 28(2) or (3) or article 29 concerning any aspect of its tender.

(5) The procuring entity shall invite contractors and suppliers whose tenders have not been rejected to submit final tenders with prices. The procuring entity may delete or modify any aspect, set forth in the solicitation documents, of the technical or quality characteristics of the goods, construction [or services] to be procured, [and any criterion set forth in those documents for evaluating and comparing tenders and for ascertaining the most economic tender,] and may add new characteristics [or criteria] that conform with this Law. Any such deletion, modification or addition shall be communicated to contractors and suppliers in the invitation to submit final tenders. 5/ A contractor or supplier not wishing to submit a final tender may withdraw from the tendering proceedings [without forfeiting its tender security]. 6/ The final tenders shall be evaluated and compared in order to ascertain the most economic tender as defined in article 28(7)(c). 7/

(6) The procuring entity shall include in the record 8/ required under article 33 a statement of the circumstances on which it relied in invoking paragraph (1) of this article, specifying the relevant facts.

Notes

* The second draft of article 31, which was not reviewed by the Working Group at the twelfth session, is presented here, with the accompanying notes, as it appeared in A/CN.9/WG.V/WP.28. At the twelfth session, the Working Group, in connection with its review of article 7, agreed that the conditions for use and procedures for two-stage tendering should be in essence those presently provided in article 31, with appropriate modifications made to take into account the decision to treat that method as a method of procurement other than tendering (see A/CN.9/343, para. 80). In line with that decision, the substance of article 31 would appear in Section I of Chapter III, as article 33 bis, and the present section would be deleted. The reference to approval in the chapeau of paragraph (1) should be modified in accordance with A/CN.9/343, paras. 66 and 67, and the references to services in paragraphs (1)(a) and (5) should be deleted in accordance with A/CN.9/343, para. 20 (see note 1 under article 2).

1. See note 1 to article 6.

2. See A/CN.9/331, paras. 185 and 188. With respect to the references to services in this paragraph and elsewhere in the article, see note 8 to article 2.

3. The reference to articles 18 and 20 has been included pursuant to A/CN.9/331, para. 189. The second sentence of the paragraph has been added pursuant to A/CN.9/331, para. 188. With respect to the reference to solicitation documents, see note 1 to heading of Section IV.

4. See A/CN.9/331, para. 191. The word "article" has been added to achieve greater clarity.

5. See A/CN.9/331, paras. 190 and 192.

6. The reference to the tender security has been placed within square brackets pursuant to the proposal in A/CN.9/331, para. 192.

7. Pursuant to A/CN.9/331, paras. 92 and 166, the term "most economic tender" replaces the term "most advantageous tender" that appeared in the first draft, and the reference to article 28(7)(c) has been added pursuant to A/CN.9/331, para. 189.

8. Pursuant to A/CN.9/331, para. 207, the word "record" replaces the word "minutes" that appeared in the first draft.

* * *

SECTION IX. ACCEPTANCE OF TENDER AND ENTRY INTO FORCE OF PROCUREMENT CONTRACT; RECORD OF TENDERING PROCEEDINGS 1/

Article 32. Acceptance of tender and entry into force of procurement contract *

(1) The tender that has been ascertained to be the most economic tender pursuant to article 28(7)(c) shall be accepted. 2/ However, if the contractor or supplier submitting that tender is required to reconfirm its qualifications pursuant to article 28(8 bis), its tender shall not be accepted unless its qualifications are reconfirmed. 3/ Notice of acceptance of the tender shall be given promptly to the contractor or supplier submitting the tender.

[(2) Except as provided in paragraph (3)(b), 4/ a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) is dispatched to the contractor or supplier that submitted the tender, provided that it is dispatched while the tender is in force and effect.] 5/

[(3) (a) Notwithstanding the provisions of paragraph (2), the notice referred to in paragraph (1) may require the contractor or supplier whose tender has been accepted to sign a written procurement contract conforming to the tender. [When the notice, or the applicable law relative to the formation of contracts, requires the signature of a written

contract,] 4/ the procuring entity and 6/ the contractor or supplier shall sign the procurement contract within a reasonable period of time after the notice is dispatched to the contractor or supplier.

(b) Where a written procurement contract is required to be signed pursuant to paragraph (3)(a), 4/ the procurement contract enters into force when the contract is signed by the contractor or supplier and by the procuring entity. Between the time when the notice referred to in paragraph (1) is dispatched to the contractor or supplier and the entry into force of the procurement contract:

(i) neither the procuring entity nor the contractor or supplier shall take any action that would defeat the object or purpose of the contract or that would interfere 6/ with the entry into force of the procurement contract or with its performance;

(ii) the procuring entity and the contractor or supplier shall inform each other of any circumstance of which they are aware that could interfere with the entry into force of the procurement contract or its performance; 6/

(iii) the procuring entity and the contractor or supplier shall cooperate with each other as necessary in order for the procurement contract to enter into force.] 5/

[(4) If the contractor or supplier whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the tender that is ascertained to be the next most economic tender pursuant to article 28(7)(c) 7/ and that is in force may be accepted. 8/ The notice provided for in paragraph (1) shall be given to the contractor or supplier that submitted that tender.] 9/

(5) Upon the entry into force of the procurement contract and the provision by the contractor or supplier of a security for the performance of the contract, if required, notice of the procurement contract shall be given to other contractors and suppliers, specifying the name and address of the contractor or supplier that has entered into the contract and the price of the contract.

(6) (a) The notices referred to in this article may be given in writing or by any other means that provides a record of the information contained therein. [However, the notices may be communicated by telephone provided that, immediately thereafter, confirmation of the notice is communicated in writing or by any other means that provides a record of the confirmation.] 10/

(b) The notice under paragraph (1) is "dispatched" when it is properly addressed or otherwise directed and transmitted to the contractor or supplier, or conveyed to an appropriate authority for transmission to the contractor or supplier, by a mode authorized by paragraph (6)(a). 11/

Notes

* The second draft of article 32, which was not reviewed by the Working Group at the twelfth session, is presented here, with the accompanying notes, as it appeared in A/CN.9/WG.V/WP.28.

1. Pursuant to A/CN.9/331, para. 207, the term "minutes of tendering proceedings" has been changed to "record of tendering proceedings".

2. Pursuant to A/CN.9/331, para. 194, the words "subject to approval" have been deleted from this paragraph and from paragraph (4) (see, also, note 1 to article 6). Pursuant to A/CN.9/331, paras. 92 and 166, the term "most economic tender" replaces the term "most advantageous tender" that appeared in the first draft, and the reference to article 28(7)(c) has been added.

3. See A/CN.9/331, paras. 70 and 78.

4. See A/CN.9/331, para. 196.

5. Paragraphs (2) and (3) have been placed within square brackets in view of the differing views reflected in A/CN.9/331, paras. 197 to 200. They will be retained in their present form unless the Working Group decides otherwise. Pursuant to A/CN.9/331, para. 195, the references to receipt of the notice of acceptance of the tender have been deleted. It will be noted that the "dispatch" approach differs from the approach in the United Nations Convention on Contracts for the International Sale of Goods, art. 24. See the discussion of this point in the Working Group note following paragraph 1 of the commentary to article 32 in the first draft.

6. See A/CN.9/331, paras. 202, 203 and 206.

7. Pursuant to A/CN.9/331, paras. 92 and 166, the term "most economic tender" replaces the term "most advantageous tender" that appeared in the first draft, and the reference to article 28(7)(c) has been added.

8. Pursuant to A/CN.9/331, para. 194, the words "subject to approval" have been deleted (see, also, note 1 to article 6.). The phrase "in force and effect" that appeared in the first draft has been changed to "in force".

9. Paragraph (4) has been placed within square brackets in the light of the differing views reflected in A/CN.9/331, para. 205. The paragraph will be retained in its present form unless the Working Group decides otherwise.

10. See A/CN.9/331, para. 117.

11. Pursuant to A/CN.9/331, para. 195, alternative 2 of paragraph 6(b) has been deleted.

* * *

Article 33. Record of tendering proceedings * 1/

(1) The procuring entity shall prepare a record of the tendering proceedings, including the opening, examination, evaluation and comparison of tenders. The record shall contain a brief description of the goods or construction to be

procured, the names and addresses of contractors and suppliers that submitted tenders; information relative to the qualifications, or lack thereof, of those contractors and suppliers; 2/ the price and a summary of the other principal terms and conditions of each tender and of the procurement contract; a summary of the evaluation and comparison of tenders; the information required by article 28(3), if a tender was rejected pursuant to that provision; 3/ if all tenders were rejected pursuant to article 29, a statement to that effect; and, where applicable, the statement required by article 31(6).

(2) The record of the tendering proceedings shall be made available for inspection by any person 4/ after [a procurement contract has entered into force and the contractor or supplier has supplied a security for the performance of the contract, if required,] [a tender has been accepted] 5/ or after tendering proceedings have been terminated without resulting in a procurement contract. However:

(a) information shall not be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition; 6/

(b) information relating to the examination, evaluation and comparison of tenders[, and tender prices,] shall not be disclosed. 7/

Notes

* The second draft of article 33, which was not reviewed by the Working Group at the twelfth session, is presented here, with the accompanying notes, as it appeared in A/CN.9/WG.V/WP.28.

1. Pursuant to A/CN.9/331, para. 207, the term "minutes of tendering proceedings" that appeared in the first draft has been changed to "record of tendering proceedings" in the title and text of article 33.

2. Pursuant to A/CN.9/331, para. 45, the words "eligibility and" that appeared in the first draft have been deleted.

3. See A/CN.9/331, para. 152.

4. Pursuant to A/CN.9/331, para. 209, the words "any person" replace the words "the general public" that appeared in the first draft.

5. Pursuant to the proposal in A/CN.9/331, para. 212, two alternatives are presented within square brackets for the consideration of the Working Group. The first alternative, which appeared in the first draft, is that the record of the tendering proceedings is to be disclosed after the procurement contract has entered into force and the contractor or supplier supplies a performance security. The second alternative is that disclosure must take place when a tender has been accepted. The time when a tender is accepted would seem to be the earliest time when disclosure of the record could be required, since prior to that time the tendering proceedings would still be in progress and the record would not necessarily have been prepared or completed. It will also be noted that, pursuant to article 32, the acceptance of the tender and the entry into force of the procurement contract will occur simultaneously, except where

the signature of a written contract is required. Unless the Working Group decides otherwise, the first alternative will be retained.

6. See A/CN.9/331, para. 210.

7. See A/CN.9/331, para. 211. The Working Group may wish to consider whether disclosure of this information, and in particular the tender prices (reference to which has been set forth within square brackets), is important in order to assure participants in the tendering proceedings, and the public in general, that the procurement law and the procurement regulations have been complied with, and in order to enable an aggrieved contractor or supplier to seek review of acts or decisions of, or procedures followed by, the procuring entity. Articles 33, 34(4) and 35 deal with analogous matters. Once the text of those provisions is settled, they might be consolidated into a single article.

* * *

CHAPTER III. PROCUREMENT OTHER THAN BY MEANS OF TENDERING PROCEEDINGS

[SECTION I. TWO-STAGE TENDERING PROCEEDINGS] 1/

Article 33 bis. [reserved]

Note

1. See the note to the title of article 31.

* * *

SECTION II. REQUEST-FOR-PROPOSALS PROCEEDINGS 1/

Article 33 ter. Request for proposals

(1) (Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of request for proposals when the procuring entity has not decided upon the particular nature or specifications of goods or construction to be procured and seeks proposals as to various possible means of meeting its needs. 2/

(2) The provisions of chapter II of this Law, with the exception of articles 25, 27 and 30, shall apply to request-for-proposals proceedings except to the extent those provisions are derogated from in section II of chapter III. 3/

(3) A procuring entity shall solicit proposals from all interested contractors and suppliers by causing a request for proposals or, if prequalification proceedings are to be engaged in, an invitation to prequalify, to be published in accordance with article 12 or, in accordance with article 12, by sending a request for proposals only to particular contractors and suppliers selected by it. 4/

(4) (a) The request for proposals shall contain at least the following information:

(i) a description of the procurement need for which the procuring entity is seeking proposals, including any technical specifications and other parameters to which proposals must conform, and the location of any construction to be effected;

(ii) the information referred to in article 14(1), with the exception of subparagraph (b). 5/

(b) Unless the request for proposals specifies that the procuring entity will issue a separate set of solicitation documents in accordance with article 33 quater, the request for proposals shall contain, in addition to the information referred to in article 14(1)(a) and (1)(d bis), the information referred to in article 33 quater. 6/

(c) If prequalification proceedings are to be engaged in, the invitation to prequalify shall contain the information referred to in paragraph (4)(a)(i) and the information referred to in article 14(2), with the exception of the information referred to in article 14(1)(b). 7/

Notes

1. Section II has been added pursuant to the decision in A/CN.9/343, paras. 75, 81 and 82, to provide in the Model Law for procurement by request for proposals. Section II contains provisions setting forth the conditions and procedures for use agreed upon by the Working Group, as well as provisions on issues that appear to the Secretariat to warrant coverage in the Model Law.

2. See A/CN.9/343, para. 81.

3. Paragraph (2) derogates from article 25 since limitations on the right of the contractor or supplier to modify or withdraw its proposal are inconsistent with the flexibility required for request for proposals proceedings. In view of the provision concerning opening of proposals contained in article 33 quinquies(1), and the provision on negotiation in article 33 quinquies(2), paragraph (2) also derogates from articles 27 and 30.

4. The reference to article 12 incorporates the publication requirements outlined in that article, as well as the possibility of limiting participation in the procurement proceedings to contractors and suppliers selected by the procuring entity. In line with the suggestion in note 2 under article 12, the Working Group may wish to consider using a term other than "request for proposals" to describe the medium by which the procuring entity solicits proposals.

5. Most of the information requirements set forth in article 14(1) for the invitation to tender are incorporated by subparagraph (4)(a)(ii). Subparagraph (4)(a)(i) replaces the requirement in article 14(1)(b), since, in request for proposal proceedings, the procuring entity is not in a position to describe the goods or construction to be procured with the same degree of precision as in tendering proceedings.

6. In cases in which the procuring entity can provide in the request for proposals the information necessary for contractors and suppliers to prepare their proposals, solicitation documents would not be issued. Pursuant to paragraph (4)(b), requests for proposals in such cases are to contain the

types of information that would otherwise be found in the solicitation documents. The reference to article 14(1)(a) concerns the name and address of the procuring entity, and the reference to article 14(1)(d bis) refers to the declaration by the procuring entity as to participation by contractors regardless of nationality. Such a declaration would be relevant in those cases in which the procuring entity was soliciting proposals by advertising rather than by selective invitation.

7. Paragraph (4)(c) sets forth the required contents of an invitation to prequalify in request-for-proposals proceedings by incorporating the provisions of article 14(2). The reference in article 14(2) to article 14(1)(b) is excluded because a requirement for information about the goods or construction to be procured is incorporated by way of the reference to paragraph (4)(a)(i) (see note 5).

* * *

Article 33 quater. Solicitation documents

(1) The procuring entity shall provide a set of solicitation documents to contractors and suppliers in accordance with the procedures and requirements specified in the request for proposals. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each contractor and supplier that has been prequalified and that pays the price, if any, charged for those documents. 1/

(2) The solicitation documents shall contain the following information: 2/

(a) a description of the procurement need for which the procuring entity is seeking proposals, including any technical specifications and other parameters to which proposals must conform, and the location of any construction to be effected; and the desired or required time, if any, when the goods are to be delivered or the construction is to be effected; 3/

(b) the criteria, in accordance with article 33 quinquies, to be used for evaluating the proposals and the relative weight to be afforded to the different criteria; and 4/

(c) the information referred to in article 17(2), with the exception of subparagraphs (e), (g) and (p). 5/

Notes

1. With the exception of the reference to cases in which solicitation documents are not issued, the foregoing provision is analogous to article 17(1).

2. Unlike in the chapeau of article 17(2), there is no reference to information concerning procedures for the opening of proposals (see note 2 under article 33 quinquies).

3. Subparagraph (a) corresponds to article 17(2)(e), but is adapted to request for proposals proceedings.

4. See A/CN.9/343, para. 82.

5. Article 17(2)(e) is not incorporated because subparagraph (a) contains a provision specific to request for proposals proceedings concerning the description of the goods or construction to be procured. Article 17(2)(g), concerning a statement as to whether contractors and suppliers are to be permitted to present alternatives to requirements set forth in the solicitation documents, is not relevant to request-for-proposals proceedings, which solicit various possible types of solutions. Article 17(2)(p) is not incorporated because public opening is not required for request for proposals proceedings (see note 3 under article 33 ter) and because procedures and criteria for evaluation and comparison of proposals are referred to in paragraph (4)(b).

* * *

Article 33 quinquies. Opening, examination, evaluation and comparison of proposals

(1) Proposals shall be opened in such a manner as to avoid disclosure of the contents of proposals to competing contractors and suppliers. 1/

(2) The procuring entity may conduct negotiations with contractors and suppliers about their proposals and seek or permit revisions of proposals. Negotiations between the procuring entity and a contractor or supplier shall be confidential, and, except as provided in article 33 sexies, one party to the negotiations shall not reveal or disclose to any third person any documentation or information relating to the negotiations without the consent of the other party. 2/

(3) In selecting the contractor or supplier with which to enter into a procurement contract, the procuring entity shall evaluate the proposals using only the criteria that have been set forth in the request for proposals in accordance with article 33 ter(4) or in the solicitation documents in accordance with article 33 quater(2)(b). Those criteria may measure both the competence of the contractor or supplier and the effectiveness of its proposal in meeting the procuring entity's needs. The effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price. 3/

(4) Except as otherwise provided in this article, examination, evaluation and comparison of proposals shall be conducted in accordance with the procedures set forth in article 28.

Notes

1. In tendering proceedings, the public opening of tenders pursuant to article 27 results in the identification of contractors and suppliers that have submitted tenders and the disclosure of the prices of those tenders. Under article 33(1), there is no requirement that the opening of proposals be public. Instead the procuring entity is required to avoid disclosure of the contents of proposals to competing contractors and suppliers. Such a disclosure might compromise the negotiations with contractors and suppliers that take place after opening of the proposals. Disclosure of the prices of

proposals is not required since the prices of proposals, unlike the prices of tenders, are subject to negotiation and modification. While paragraph (1) does not require the procuring entity to disclose upon the opening of the proposals the names of contractors and suppliers that submitted the proposals, article 33 sexies does require the identification of those contractors and suppliers in the record of the proceeding made available to the general public upon the entry into force of the procurement contract.

2. While in tendering proceedings negotiations between the procuring entity and contractors for the purpose of effecting modifications in the price or substance of tenders are prohibited by articles 28(1)(a) and 30, such negotiations may be an essential element in request-for-proposals proceedings. In order to ensure that negotiations do not compromise competition or lead to abuses in the proceedings, the procuring entity is prohibited from disclosing to a contractor or supplier information derived from or about proposals made by other contractors or suppliers.

3. See A/CN.9/343, para. 82.

* * *

Article 33 sexies Record of request-for-proposals proceedings 1/

(1) The procuring entity shall prepare a record of the request-for-proposals proceedings. The record shall contain a brief description of the procurement need for which the procuring entity requested proposals; the names and addresses of the contractors or suppliers from which the procuring entity obtained proposals; information relative to the qualifications, or lack thereof, of those contractors and suppliers; the price and a summary of the other principal terms and conditions of each proposal and of the procurement contract; a summary of the evaluation and comparison of the proposals; if the proceedings did not result in a procurement contract, a statement of the reasons therefor; and the statement and facts required by article 7(5).

(2) The record shall be made available for inspection by any person after the procurement contract has entered into force; provided, however, that information shall not be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.

Notes

1. This article is based on article 33.

* * *

SECTION III. COMPETITIVE NEGOTIATION PROCEEDINGS

Article 34. Competitive negotiation proceedings *

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of contractors and suppliers to ensure effective competition. 1/

(2) Any requirements, guidelines, documents or other information relative to the negotiations that are communicated by the procuring entity to a contractor or supplier shall be communicated on an equal basis to all other contractors and suppliers engaging in negotiations with the procuring entity relative to the procurement. 2/

(3) Negotiations between the procuring entity and a contractor or supplier shall be confidential, and, except as provided in paragraph (4), one party to those negotiations shall not reveal or disclose to any third person any documentation or information relating to those negotiations without the consent of the other party.

(4) (a) The procuring entity shall prepare a record of the competitive negotiation proceedings. The record shall contain the names and addresses of contractors and suppliers with which the procuring entity has engaged in negotiations; the price and a summary of the other principal terms and conditions of the procurement contract; if the proceedings did not result in a procurement contract, a statement of the reasons therefor; and the statement and facts required by article 7(5). 3/

(b) The record of the competitive negotiation proceedings shall be made available for inspection by any person after a procurement contract has entered into force, except that information shall not be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition. 3/

Notes

* The second draft of article 34, which was not reviewed by the Working Group at the twelfth session, is presented here, with the accompanying notes, as it appeared in A/CN.9/WG.V/WP.28. In addition, set out below, following note 3, are the texts of paragraphs (new 1) and (new 1 bis), that, in accordance with A/CN.9/343, para. 75, set forth the conditions for the use of competitive negotiation agreed upon by the Working Group and the condition formerly found in article 7(4) (see note c below). Those additional paragraphs would precede paragraph (1) in the present text.

1. The final phrase of this paragraph, which appeared in the first draft, has been deleted pursuant to A/CN.9/331, para. 216.

2. The final phrase of this paragraph, which appeared in the first draft, has been deleted pursuant to A/CN.9/331, para. 217.

3. See A/CN.9/331, para. 218.

Texts of paragraphs (new 1) and (new 1 bis)

(new 1) (Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of competitive negotiation in the following circumstances: a/

(a) when, due to the nature, scope or volume of goods or construction to be procured, it is necessary to negotiate with

contractors or suppliers in order to enable the procuring entity to obtain the solution which represents the best value;

(b) when there is an urgent need for the goods or construction and engaging in tendering proceedings would therefore be impossible or imprudent;

(c) when the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development leading to the procurement of a prototype, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development costs;

(d) when, for reasons of national defence or national security, there is a need for secrecy in respect of the procuring entity's procurement needs; or

[(e) when tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to article 28(2) or (3) or article 29, and when engaging in new tendering proceedings would be unlikely to result in a procurement contract;] b/

[(f) when the estimated value of the procurement contract is less than the amount set forth in the procurement regulations.] b/

(new 1 bis) The procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (new (1)(f). c/

Notes to paragraphs (new 1) and (new 1 bis)

a. Concerning the approval requirement, see A/CN.9/343, para. 75. Subparagraphs (a) through (d) set forth the conditions for use of competitive negotiation proceedings agreed upon in A/CN.9/343, paras. 85 to 89.

b. The Working Group may wish to consider including the foregoing condition, which appeared in earlier drafts of the Model Law in article 7(2), but was not included in the conditions agreed upon in A/CN.9/343, paras. 85 to 89.

c. Retention of the foregoing provision, previously found in article 7(4), would depend on the decision with regard to subparagraph (f).

* * *

SECTION IV. REQUEST-FOR-QUOTATIONS PROCEEDINGS

Article 34 bis. Request for quotations

(1) [(Subject to approval by . . . (each State designates an organ to issue the approval),)] the procuring entity may engage in procurement by means of request for quotations for the procurement of standardized goods when the estimated value of the procurement contract is less than the amount set forth in the procurement regulations. 2/

(2) The procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1). 3/

(3) [The procuring entity shall request quotations from at least [3] contractors.] Each contractor or supplier from whom a quotation is requested shall be permitted to give only one price quotation and shall not be permitted to change its quotation. No negotiations shall take place between the procuring entity and a contractor or supplier with respect to a quotation submitted by the contractor or supplier. 4/

(4) The procurement contract shall be awarded to the contractor or supplier quoting the lowest price. 5/

(5) (a) The procuring entity shall prepare a record of the request for quotations proceedings. The record shall contain the names and addresses of contractors and suppliers from which the procuring entity has requested quotations; the price and a summary of the other principal terms and conditions of each quotation and of the procurement contract; if the proceedings did not result in a procurement contract, a statement of the reasons therefor; and the statement and facts required by article 7(5).

(b) The record of the request for quotations shall be made available for inspection by any person after a procurement contract has entered into force, except that information shall not be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition. 6/

Notes

1. The addition of Section III implements the decision in A/CN.9/343, para. 72, that the Model Law should provide for procurement through request for quotations.

2. See A/CN.9/343, para. 90. The approval requirement agreed on in A/CN.9/343, para. 75, is placed within square brackets in order to invite the Working Group to consider whether an approval requirement is appropriate in view of the low values and quantities involved in procurement by request for quotations.

2. Paragraph (2) prohibits the procuring entity from fragmenting a procurement so as to fall below the threshold referred to in paragraph (1) and to thereby avoid tendering proceedings.

4. See A/CN.9/343, para. 91. A requirement that a minimum number of quotations be solicited is included for consideration by the Working Group.

5. See A/CN.9/343, para. 91.

6. The present provision is based on similar requirements for other methods of procurement.

* * *

SECTION V. SINGLE SOURCE PROCUREMENT

Article 35. Record of single source procurement *

(1) The procuring entity shall prepare a record of the single source procurement. The record shall contain the name and address of the contractor or supplier from which the procuring entity procured the goods or construction, the price and a summary of the other principal terms and conditions of the procurement contract and the statement and facts required by article 7(5).

(2) The record shall be made available for inspection by any person after the procurement contract has entered into force; provided, however, that information shall not be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition. 1/

Notes

* The second draft of article 35, which was not reviewed by the Working Group at the twelfth session, is presented here, with the accompanying note, as it appeared in A/CN.9/WG.V/WP.28. Previously, the conditions for use of single source procurement were set forth in article 7(3)and (4). Pursuant to A/CN.9/343, para. 75, the Working Group may wish to consider adding those conditions and procedures for use to article 35 in paragraphs (new 1) and (new 1 bis), as set forth below, following note 1. Those additional paragraphs, which would precede paragraph (1) in the present text, set forth the conditions for use that had appeared in the second draft in article 7(3) and that were affirmed in A/CN.9/343, para. 92. If the conditions for use were to be included in article 35, the title of the article would be modified to read "single source procurement".

1. See A/CN.9/331. para. 220.

Texts of paragraphs (new 1) and (new 1 bis)

(new 1) (Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may procure the goods or construction by soliciting a proposal or price quotation from a single contractor or supplier when:

(a) the estimated value of the procurement contract is less than the amount set forth in the procurement regulations;

(b) the goods or construction are available only from a particular contractor or supplier, or a particular contractor or supplier has exclusive rights in respect of the goods or construction and no reasonable alternative or substitute exists;

(c) there is an urgent need for the goods or construction, making it impossible or imprudent to use other methods of procurement a/ because of the amount of time involved in using those methods;

(d) for reasons of standardization, or the need for compatibility with existing goods, equipment or technology, additional supplies must be procured from the contractor or supplier that supplied the existing goods, equipment or technology; b/

(e) the procuring entity seeks to enter into a contract with the contractor or supplier for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs;

(f) for reasons of national security or national defense there is a need for secrecy in respect of the procuring entity's procurement needs;

(g) procurement from a particular contractor or supplier is necessary in order to promote socio-economic policies specified in the procurement regulations; c/

(h) procurement from a particular contractor or supplier is necessary in order to develop a particular source of supply for reasons of national security or national defense;

(i) the scope or volume of the goods or construction required by the procuring entity exceeds the normal capacity of the relevant industry and a particular contractor or supplier is willing to build or acquire special facilities or capacity in order to supply the goods or construction.

(new 1 bis) The procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (new 1)(a). d/

Notes to paragraphs (new 1) and (new 1 bis)

a. The reference to competitive negotiation proceedings and tendering proceedings that appeared in earlier drafts has been replaced by a reference to "other methods of procurement" in view of the addition to the Model Law of request for proposals and request for quotations.

b. The Working Group may wish to consider whether subparagraph (d) should be expanded to cover construction and whether subparagraphs should be added to authorize single source procurement, under certain conditions, in cases of expansion of existing construction or repeat orders of goods not covered by subparagraph (d). Such provisions might be formulated along the following lines:

"(d bis) there is a need to expand an existing construction, provided that the procurement contract is awarded to the contractor or supplier that executed the original work and that the supplementary work does not exceed [. . .] percent of the amount of the original procurement contract; "

"(d ter) there is a need to procure additional goods, provided that the procurement contract is awarded to the contractor or supplier that provided the original goods and that the supplementary

procurement does not exceed [. . .] percent of the amount of the original procurement contract;"

c. The Working Group may wish to consider whether subparagraph (g), even with its scope limited to the promotion of specified socio-economic policies, would provide too much scope to a procuring entity to defeat the objectives of the Model Law.

d. See note 4 under article 7.

CHAPTER IV. REVIEW

(Draft articles 35 to 42, which concern the review of acts and decisions of, and procedures followed by, the procuring entity under the Model Law, are contained in A/CN.9/WG.V/WP.27.)

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PROCUREMENT

Competitive negotiation

Note by the Secretariat

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INTRODUCTION

1. As reported in A/CN.9/WG.V/WP.22, paras. 59 to 61, and 201 to 213, the procurement laws of many countries provide for procurement by negotiation between the procuring entity and contractors and suppliers prior to the award of the procurement contract. In view of the presence of such provisions in the procurement laws of many countries, the first draft of article 7 of the Model Law on Procurement (A/CN.9/WG.V/WP.24) provided for a method of procurement referred to as "competitive negotiation", which could be used when tendering proceedings had been engaged in but were unsuccessful or when the estimated value of the procurement contract was below a level set in the procurement regulations. Draft article 34 established certain procedural requirements designed to incorporate objectivity, fairness and competition into the competitive negotiation proceedings. At the eleventh session, in reviewing the first draft of article 7, the Working Group affirmed that it was desirable for the Model Law to provide for competitive negotiation as a method of procurement available to the procuring entity in certain circumstances in which tendering was not a suitable method of procurement (A/CN.9/331, para. 41). At that session, there was also significant support for expanding the circumstances in which competitive negotiation proceedings could be used beyond those provided for in the first draft of article 7 (A/CN.9/331, para. 42). In reviewing the second draft of article 7 at the twelfth session, the Working Group reaffirmed its decision to retain competitive negotiation in the Model Law in certain specified circumstances (A/CN.9/343, para. 70) and agreed upon conditions to be set forth in the Model Law for the use of that method of procurement (A/CN.9/343, para. 85). 1/

2. During the adoption of the report of the twelfth session, the secretariat was requested to prepare a report to the next session on provisions in national procurement laws relating to the conditions and procedures for use of the competitive negotiation method of procurement. 2/ The present document contains that report.

I. GENERAL REMARKS

3. The method of procurement most commonly mandated in procurement legislation is publicly advertised competitive tendering, open to all eligible and qualified contractors and suppliers. An important reason for the predominant use of competitive tendering is that it generally is most likely to lead to economy and efficiency in the use of public funds, in addition to

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1/ In accordance with the Working Group's decision that article 7 should list all the methods of procurement available under the Model Law, and that the conditions and procedures for use of those methods should be set forth in the individual articles dealing with those uses, it is suggested in A/CN.9/WG.V/WP.30 that the conditions for use of competitive negotiations agreed upon by the Working Group should be located in article 34.

2/ Because the request for the present report was made during the adoption of the report of the twelfth session rather than during the deliberations of the Working Group or during its discussion of future work, no mention is found of that request in the report of the twelfth session.

serving as a safeguard against waste, corruption and favoritism. Notwithstanding the preference for competitive tendering, the procurement laws of most countries recognize that in certain situations competitive tendering may not be an appropriate method of procurement. Therefore, the procuring entity is often permitted to use certain other methods of procurement, including engaging in negotiations with one or more contractors or suppliers with a view to entering into a procurement contract.

4. The present report focuses on the provisions in national laws that establish conditions for use and procedures for use of the type of procurement method referred to in the draft Model Law as "competitive negotiation". In considering the conditions and procedures for use of such a method, it is necessary to bear in mind that competitive negotiation is a distinct method of procurement, apart from other methods of procurement which involve a degree of pre-award negotiation between the procuring entity and contractors and suppliers. In competitive negotiation proceedings as provided for in the draft Model Law and in the procurement laws of a number of countries, the procuring entity is given a relatively free hand to conduct the procurement proceedings as it sees fit, in particular with respect to the selection of negotiating partners, the conduct of the negotiations and the examination and comparison of proposals. By contrast, methods such as two-stage tendering and request for proposals proceedings, though they involve some degree of negotiation, are subject to a relatively elaborate procedural framework. This report covers only negotiation as a separate method of procurement, not negotiation as an element in some other method of procurement.

5. The laws of a number of countries do not provide, as does the draft Model Law, for two distinct methods of procurement to cover, on the one hand, cases in which negotiation with only one contractor or supplier is possible (covered under the draft Model Law by single source procurement) and, on the other hand, cases in which negotiations can be conducted with more than one contractor or supplier (covered under the draft Model Law by competitive negotiation). Instead, such laws list the various conditions in which the procuring entity is permitted to procure by negotiation, including single source situations. Some of those laws include a general requirement that in negotiation proceedings the procuring entity, to the degree possible, should negotiate with a sufficient number of contractors and suppliers judged susceptible of filling the procurement need so as to ensure competition. To the extent that conditions for the use of negotiation in those types of statutes relate only to single source procurement, they are not discussed in the present report.

II. CONDITIONS FOR USE OF NEGOTIATION

6. In the procurement laws of some countries, designated governmental authorities or procuring entities themselves are given broad discretion to authorize or to engage in procurement through negotiation when it is considered appropriate to do so. In some of those countries, procuring entities operating in particular economic sectors (e.g., transportation or energy) are given more discretion than procuring entities operating in other sectors in deciding whether to procure through negotiation. A reason for such an approach may be that procuring entities operating in certain sectors often procure goods or construction of a high degree of technological sophistication

or complexity and negotiation is regarded as essential for meeting the needs of the procuring entity (see paragraph 7, below). However, instead of granting such discretion, or in addition to doing so, the procurement laws of most countries specifically define the types of conditions in which a procuring entity may engage in procurement through negotiation. The principal types of conditions for the use of negotiation that are found in national procurement laws and that appear to be relevant to further consideration by the Working Group are discussed below. Those conditions are generally of the type agreed upon by the Working Group for the use of competitive negotiation under the Model Law (see A/CN.9/343, para. 85).

A. Nature of goods being procured

7. The procurement laws of many countries set forth conditions for the use of negotiation that relate to the nature of the goods or construction being procured. The laws of a number of countries authorize procurement through negotiation when the goods or construction are of a high degree of technological sophistication or are particularly complex or unique. For example, some statutes refer to the procurement of non-standardized, technologically advanced goods, such as ships, aircraft or computers, that must be specially tailored to meet the needs of the procuring entity as a case in which the negotiation may be used. Provisions are also found in some countries authorizing negotiation when there is a need for the contractor or supplier to make use of a patent or special process in which it has a proprietary interest in order to meet the needs of the procuring entity or when only a few contractors or suppliers have the technical or commercial capability of meeting the procuring entity's needs. Yet other provisions are found permitting negotiation when the nature of the goods or construction make it impossible for a contractor or supplier to make a prior estimate of the overall price of the procurement contract. The laws of a number of countries explicitly permit the procurement through negotiation of works of an artistic nature.

8. The laws of some countries authorize procurement through negotiation when the goods or construction, due to their particular nature or intended use, have to be purchased or executed in a certain place.

B. Purpose of procurement

9. Procurement laws generally contain provisions authorizing procurement through negotiation on the basis of the purpose for which goods or construction are being procured. Foremost in this category are provisions authorizing negotiation for procurement involving national defence or national security considerations. A factor cited in many such provisions is the need to maintain secrecy. Other defence-related factors cited in some laws as possible justifications for procurement through negotiation include the need to develop production capacity in certain industries and the need to maintain the rapid production capacity of certain industries.

10. Procurement laws also generally authorize the procurement through negotiation of goods or construction to be used for the purpose of research or testing. The procurement laws of some countries permit negotiation when goods or construction are being procured for other specified purposes (e.g, in

connection with the official residences of certain government officials or for the use of certain government instrumentalities).

C. Urgency

11. The laws of most countries permit procurement through negotiation in cases in which there is an urgent need for the goods or construction. In some of those countries, however, resort to negotiation on the grounds of urgency is limited to cases in which the urgency arises from circumstances, such as natural disasters, that are unforeseeable or not attributable to the procuring entity. A particular case of urgency to which reference is made in the laws of some countries is the default in the performance of a procurement contract by a contractor or supplier or a rescission of a procurement contract by the procuring entity. In some countries, resort to negotiation in such cases is authorized only if it is not possible to select a new contractor or supplier on the basis of tenders submitted in the tendering proceedings that gave rise to the original procurement contract.

D. Amount of procurement contract

12. While the laws of many countries authorize negotiation in the context of high value procurement, at the same time provisions are commonly found permitting the procuring entity to engage in procurement through negotiation for contracts whose estimated value falls below a specified level. In some countries, the level below which negotiation is permitted varies according to the type of goods or construction being procured.

E. Unsuccessful tendering proceedings

13. The procurement laws of a number of countries permit procurement through negotiation when the procuring entity has engaged in tendering proceedings but either no tenders or no responsive tenders have been submitted. Some statutes that give the procuring entity the right to procure through negotiation following unsuccessful tendering proceedings impose limitations on that right. In particular, provisions are found requiring the procuring entity to attempt the tendering proceedings a second time before resorting to negotiation. In some countries, the second tendering proceedings may be avoided in cases of urgency. Another limitation stipulated in the laws of some countries is that negotiation may be used following unsuccessful tendering proceedings only if the original terms of the procurement contract to be concluded are not substantially altered.

III. PROCEDURES FOR USE OF NEGOTIATION

14. Procedures to be followed in procurement through negotiation are typically characterized by a higher degree of flexibility than the procedures applied to other methods of procurement. Few rules and procedures are established to govern the process by which the parties negotiate and conclude their contract. In some countries procurement laws allow procuring entities virtually unrestricted freedom to conduct negotiations as they see fit. The

procurement laws of other countries establish a procedural framework for negotiation designed to maintain fairness and objectivity and to bolster competition by encouraging participation of contractors and suppliers. Provisions on procedures for procurement through negotiation address a variety of issues discussed below, in particular, requirements for approval of the procuring entity's decision to procure through negotiation, selection of negotiating partners, criteria for comparison and evaluation of offers, and the record of the procurement proceedings.

A. Approval

15. A threshold requirement found in many countries is that a procuring entity obtain the approval of a higher authority prior to engaging in procurement through negotiation. Such provisions generally require the application for approval to be in writing and to set forth the grounds necessitating the use of negotiation. Approval requirements are intended, in particular, to ensure that the negotiation method of procurement is used only in appropriate circumstances. The laws of some countries require approval only for contracts whose value exceeds a specified level. In some provisions of that type, different levels are set for different types of procurement (e.g., the level above which approval would be required may be higher for the procurement through negotiation of construction than for the procurement through negotiation of supplies).

16. Some procurement laws that stipulate unsuccessful tendering proceedings as a grounds for resorting to negotiation (see paragraph 13, above) exempt the procuring entity from the approval requirement if all contractors and suppliers that participated in the procurement proceedings and that met eligibility requirements are given an opportunity to participate in the negotiations.

B. Selection of negotiating partners

17. In order to make the negotiation proceedings as competitive as possible, the procurement laws of a number of countries contain a general requirement that the procuring entity must engage in negotiations with as many contractors or suppliers judged susceptible of meeting the procurement need as circumstances permit. Beyond such a general provision, there is no specific provision in the laws of some countries on the minimum number of contractors or suppliers with whom the procuring entity is to negotiate. The laws of some other countries, however, require the procuring entity, where practicable, to negotiate with, or to solicit proposals from a minimum number of contractors or suppliers (e.g., three). The procuring entity is permitted to negotiate with a smaller number in certain circumstances, in particular, when less than the minimum number of contractors or suppliers were available. The laws of some countries further specify that negotiation of contracts whose value falls within a specified range must involve a minimum number of contractors or suppliers from certain categories or lists (e.g, economically disadvantaged contractors and suppliers).

18. Under the laws of many countries the procuring entity is allowed to contact directly the contractors and suppliers with whom it wishes to negotiate without the need to advertise the procurement proceedings or adhere

to any other formal notice requirements. However, the laws of a number of countries require a notice of the negotiation proceedings to be given to contractors and suppliers in a specified manner. For example, the procuring entity may be required to publish the notice in a particular publication. Such notice requirements are intended to bring the procurement proceedings to the attention of a wider range of contractors and suppliers than might otherwise be the case, thereby promoting competition. Some laws also provide that, as in formal tendering, the notice should contain specified types of information and should be issued in sufficient time to allow contractors and suppliers to prepare offers. In the procurement laws of some countries, formal notice requirements are applicable to procurement through negotiation only if the estimated value of the procurement contract is above a specified level.

19. In some countries, notice requirements are waived when the procuring entity resorts to negotiation following unsuccessful tendering proceedings (see paragraph 13, above) if all qualified contractors or suppliers that submitted tenders are permitted to participate in the negotiations or if no tenders at all were received.

20. Eligibility requirements for participation of contractors and suppliers in negotiation proceedings are another aspect of the selection of negotiating partners addressed in some procurement laws. Generally the formal eligibility requirements applicable to contractors and suppliers in tendering proceedings also apply in negotiation proceedings.

C. Criteria for comparison and evaluation of offers

21. The procurement laws of some countries refer to general criteria for comparing and evaluating offers made during the negotiations and for selecting the winning contractor or supplier. For example, the procuring entity may be required to negotiate the "most economical" or "most advantageous" procurement contract, taking into account factors such as the technical merit of an offer, price, operating and maintenance costs, the effect of the contract terms on the contractor or supplier, and the profitability and development potential of the procurement contract.

D. Record of procurement proceedings

22. The laws of a number of countries require a procuring entity that engages in procurement through negotiation to establish a record of the procurement proceedings. Provisions of this type require the record to include information concerning the circumstances necessitating the use of negotiation, the contractors or suppliers invited to negotiate, the contractors or suppliers that requested to participate, and the contractors or suppliers that were excluded from participating and the grounds for their exclusion.